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No. 12540

United States Court of Appeals

for the Ninth Circuit.

JACUZZI BROS., Incorporated, a Corporation,
Appellant,

vs.

BERKELEY PUMP COMPANY, a Corporation, BERKELEY PUMP COMPANY, a Partnership, and FRED A. CARPENTER, LANA L. CARPENTER, F. F. STADELHOFER, ESTELLE E. STADELHOFER, JACK L. CHAMBERS, WYNNIE T. CHAMBERS, CLEMENS W. LAUFENBERG and MARIE C. LAUFENBERG, Partners Associated in Business under the Fictitious Name and Style of Berkeley Pump Company,
Appellees.

SUPPLEMENTAL Transcript of Record

Volume III
(Pages 623 to 665)

Appeal from the United States District Court
Northern District of California,
Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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In the United States District Court, Northern District of California, Southern Division

Civil Action No. 27905-G

JACUZZI BROS., INCORPORATED, a Corporation,

Plaintiff,

vs.

BERKELEY PUMP COMPANY, a Corporation, BERKELEY PUMP COMPANY, a Partnership, and FRED A. CARPENTER, LANA L. CARPENTER, F. F. STADELHOFER, ESTELLE E. STADELHOFER, JACK L. CHAMBERS, WYNNIE T. CHAMBERS, CLEMENS W. LAUFENBERG and MARIE C. LAUFENBERG, Partners, Associated in Business Under the Fictitious Name and Style of BERKELEY PUMP COMPANY,

Defendants.

NOTICE OF TAKING DEPOSITION

To Jacuzzi Bros., Incorporated, a corporation, the plaintiff above named, and to Charles O. Bruce and Nathan G. Gray, its attorneys:

You and Each of You will please take notice that defendants in the above-entitled action will take the deposition, pursuant to the Federal Rules of Civil Procedure, of the following witness:

Davide Veronesi
Via Rivabella n.5
Bologna, Italy

before Violet Neuenburg, a notary public in and for the City and County of San Francisco, or some other qualified notary public, at the office of Mellin and Hanscom, 391 Sutter Street, San Francisco 8, California, at the hour of ten a.m. on Tuesday, May 3, 1949, and if not completed on that day, the taking of the same shall continue thereafter from day to day until fully completed.

MELLIN AND HANSCOM,

By /s/ LEROY HANSCOM,
Attorneys for Defendants.

Dated: April 30, 1949.

Affidavit of Service by Mail attached.

[Title of District Court and Cause.]

Be It Remembered, that commencing on Tuesday, the 3rd day of May, 1949, at 10:00 o'clock a.m., pursuant to Notice of Taking Deposition, hereto annexed, at the office of Messrs. Mellin and Hanscom, Suite 500, 391 Sutter Street, San Francisco, California, personally appeared before me, Violet Neuenburg, a notary public in and for the City and County of San Francisco, State of California.

DEPOSITION OF DAVIDE VERONESI
a witness called on behalf of the defendants herein.

CHARLES O. BRUCE, ESQUIRE, and
NATHAN G. GRAY, ESQUIRE,
Appeared as attorneys for the plaintiff; and

MELLIN and HANSCOM, represented by
OSCAR A. MELLIN, ESQUIRE, and
JACK E. HURSH, ESQUIRE,

Appeared as attorneys for the defendants. [1*]

The said witness, having been by me, through the interpreter, Camillo Marzo, first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the above-entitled cause, did thereupon depose and say as hereinafter set forth.

It was stipulated between counsel for the respective parties that the notary public, after administering the oath to the witness, need not remain further during the taking of this deposition.

It was further stipulated that the said deposition should be recorded by Harold H. Hart and R. R. Roberson, competent official reporters and disinterested persons, and thereafter transcribed by them into typewriting, to be read to or by the said witness, who, after making such corrections therein as may be necessary, will subscribe the same.

It was further stipulated that all objections to questions propounded to the said witness shall be reserved by each of the parties, save and except any objections as to the form of the questions propounded.

Mr. Mellin: May we stipulate that the notary may be excused?

*** Page numbering appearing at top of page of original Reporter's Transcript of Record.**

Mr. Gray: Yes. And we will have all the usual stipulations.

Mr. Mellin: Well, what are they?

Mr. Gray: Well, Mr. Hart, you have them all. That all objections are to be reserved until the time of trial, with [2] the exception as to the form of the question; and I think in view of the fact that there is to be an interpretation of his testimony, that probably he should sign and make corrections that are necessary.

Mr. Mellin: Anticipating that, we have arranged for a daily; and that will be all right with me. That is why we have asked for a daily on this.

Mr. Gray: It will be more convenient for us to waive it?

Mr. Mellin: It would be more convenient to him, because he is over here, and he wants to fly back to Italy right away.

Mr. Gray: Well, perhaps we will agree to waive his signature, because it would be a convenience to you not to have him sign the deposition. I am inclined to waive it.

Mr. Bruce: Normally—this may prove to be a somewhat important deposition; and I presume it is from your point of view; and he is here from Italy. I wouldn't want to waive it at this time. We can check that at the end of the deposition, and determine whether or not to waive it. What other stipulations have you entered into?

The Reporter: Objections reserved except as to the form of the question.

Mr. Mellin: And the stipulation excusing the notary.

Mr. Bruce: And that this gentleman, Mr. Marzo, is that it?

Mr. Mellin: Yes.

Mr. Bruce: That Mr. Marzo can act as the interpreter.

Mr. Mellin: He has been appointed by the court.

Mr. Bruce: Yes.

Mr. Mellin: Let the record show that Camillo Marzo—you have a copy of it—has——

Mr. Bruce: We will take your word for it.

Mr. Mellin: Mr. Hursh has a copy of it. It is pursuant to an order of court of yesterday, or whenever that date is.

(The interpreter, Camillo Marzo, was duly sworn by the notary public to correctly translate the questions from the English language into the Italian language, and the answers of the witness from the Italian language into the English language, and thereafter the notary public administered the statutory oath through the said interpreter to the witness.)

DAVIDE VERONESI

a witness called on behalf of the defendants, being first duly cautioned and sworn through the interpreter, Camillo Marzo, to tell the truth, the whole truth, and nothing but the truth, testified as follows:

(Deposition of Davide Veronesi.)

Direct Examination

By Mr. Mellin:

Q. Will you give your full name?

A. Davide Veronesi.

Q. And where do you reside?

A. In Bologna, Italy.

Q. What is your street address?

A. Via Rivabella number 5.

Q. Do you speak and understand English?

A. No.

Q. Where were you born? A. Bologna. [4]

Q. Italy? A. Italy.

Q. Have you studied English at all?

A. No.

Q. Have you been out of Italy before your present trip to the United States? A. No.

Q. Will you briefly outline your education?

A. I attended the elementary schools; the Liceo, which is equivalent to the high school—the scientific—the scientific high school; and the University of Bologna.

Q. What profession did you study while at the University of Bologna? A. Civil engineering.

Q. Does that or does that not include mechanical engineering?

A. Yes, included in civil engineering there are a number of subjects concerning mechanical studies.

Q. What is your father's name? A. Hugo.

Q. Hugo Veronesi? A. Veronesi.

(Deposition of Davide Veronesi.)

Q. What is his address?

A. Via Osservansa number 2.

Q. Of Bologna? A. Of Bologna.

Q. I hand you original letters patent of Italy, No. 260,417, apparently issued to Hugo Veronesi; and I will ask you if the Hugo Veronesi named there is your father?

(Document shown to witness and the counsel.)

A. Yes.

Mr. Bruce: We would like to make a reservation on the record of the right to check this document and to interpose any objections—reserve any objections which we may find after having checked it.

Q. (By Mr. Mellin): Is that the original letters patent? A. Yes. [5]

Mr. Gray: Just a moment. I object to that on the ground that the letters patent are the best evidence.

Mr. Mellin: Well, one moment. I am going to object, on the record. Only one of you are going to object; not both of you. Only one counsel has the right to object; and you will have to make your selection.

Mr. Bruce: For the record, let the record appear that it is perfectly proper for the counsel to object to questions. While only one may interrogate, any number can object. That is the rule.

(Deposition of Davide Veronesi.)

Q. (By Mr. Mellin): And where did you obtain this original letters patent? A. Rome.

Mr. Mellin: May that be marked for identification as——

Mr. Candido Jacuzzi: May I make a statement here now? You asked where did he obtain——

Mr. Mellin: Are you counsel, too?

Mr. Bruce: No, he is——

Mr. Jacuzzi: I am trying to check on the language. He did not obtain the patent, but the father did.

Mr. Mellin: I said, "Where did you obtain this original letters patent?" I didn't ask him about the patent. I asked him about this, and he said from his father.

(Unreported discussion.)

Mr. Mellin: I will ask that the letters patent No. 260,417, just identified by the witness be marked as Defendants' Exhibit Q. [6]

(Letters patent No. 260,417, issued to Hugo Veronesi, marked "Defendants' Exhibit Q.")

Mr. Bruce: At this time I would like to note an objection to the taking of this deposition one week preceding trial, and to the offer of any proof as to any circumstances of prior knowledge and use for the purpose of anticipating or invalidating the patents in suit, or either of them, upon the ground that the defendants have failed to give the notice required by Section 4920 of the Revised Statutes of the United States.

(Deposition of Davide Veronesi.)

Q. (By Mr. Mellin): I hand you what appears to be original letters patent No. 139,161, of Italy, which was issued apparently to Hugo Veronesi; and ask you if that Hugo Veronesi named there is your father?

(Document handed to counsel and to witness.)

Mr. Bruce: We specifically make the objection to any testimony respecting this patent 139,161, upon the grounds previously stated.

Mr. Mellin: Read the question to the witness.

(Question read by reporter.)

A. Hugo Veronesi is my father.

Q. And that is the Hugo Veronesi named in this patent? A. Yes.

Q. Where did you get this particular document?

A. From the records of the company.

Q. What company?

A. From the Veronesi Company.

Mr. Mellin: I will ask that the notary mark that for identification as Defendants' Exhibit R.

Mr. Bruce: May it be stipulated that our objection goes to the testimony relative to that patent, Mr. Mellin?

Mr. Mellin: I don't know of any objection you can make; but if you want, it is all right with me.

Mr. Gray: What number did you give that?

Mr. Mellin: "R."

Q. And that is the original Italian patent, is it?

(Deposition of Davide Veronesi.)

Mr. Gray: That is objected to as calling for the opinion and conclusion of the witness.

Q. (By Mr. Mellin): That is the original Italian patent? A. Yes.

Q. As distinguished from a copy? Ask him that. Tell him to answer it "Yes" or "No."

A. It is the original document.

Q. Do you know what business your father, Hugo Veronesi, was in in 1928?

Mr. Bruce: Objected to——

Mr. Mellin: Wait until the question gets to him.

Mr. Bruce: Oh, I have a right to object.

Mr. Mellin: Oh, certainly you have.

Mr. Bruce: Without being held up.

Mr. Mellin: It would help if we could get the question to him, and then you can object to it before he answers.

The Interpreter: What was the question?

Mr. Mellin: You see, we have to do it all over again. [8]

(Question read by reporter.)

A. He had a firm which constructed pumps.

Q. What was the name of that firm at that time?

A. Costruzioni Elettromeccaniche Hugo Veronesi.

Q. Will you state whether you are connected with that company at this time?

A. No, he says that firm was dissolved, and was ceded to me in 1933.

Q. Did you or did you not become the owner

(Deposition of Davide Veronesi.)

of that firm in 1933? A. Yes, I became the owner.

Q. In 1933? A. In 1933.

Q. By the way, what is your age?

A. 38 years old.

Q. When did you graduate from the University of Bologna? A. In 1936.

Q. Did he or did he not have any duties or have any association with that firm during the years he was going to the University of Bologna?

A. Yes.

Q. Will you explain what you did there while you were going to the University of Bologna?

A. My duties were drafting; I assisted in sales; I was shop manager.

Q. Prior to 1933, did he have any connection with that firm as an employee or worked for his father?

A. I used to go to the factory, and I saw what was being manufactured, and I knew what was being manufactured.

Q. Was your father the owner of that business you named [9] prior to 1933? A. Yes.

Q. How long, if he knows of his own knowledge, was his father in that business of making pumps prior to 1936?

A. He made his first experiment in pumps in 1912.

Q. And did he manufacture pumps continuously thereafter, or not?

(Deposition of Davide Veronesi.)

A. He continued manufacturing pumps until 1939.

Q. Was that continuously during that period, or was it interrupted at any time?

A. There was an interruption during the first world war.

Q. And what happened in 1939?

A. We quit completely the manufacture of pumps in 1939.

Q. Who managed the business that he named a while ago after it was ceded to him in 1933—did he say 1933? A. 1933.

Q. Who managed the business from then on?

A. I was. I did.

Q. Is that company still in existence?

A. Yes, now up to this time.

Q. And what do they manufacture now?

A. Filter presses and centrifugal separators.

Mr. Gray: Centrifugal separators?

Mr. Mellin: Yes.

Q. And what type of pumps did they manufacture from 1933 to 1939?

Mr. Bruce: Just a moment. I object to that because, in [10] accordance with the testimony, he said that they manufactured filter presses and centrifugal separators.

Mr. Mellin: After——

Mr. Gray: No, the question was between 1933 and 1939, wasn't it?

Mr. Mellin: That's right.

(Deposition of Davide Veronesi.)

Q. What was the answer?

A. Eureka Pumps.

Q. And what type of pumps are those?

A. They are jet—they are pumps with jets.

Q. For pumping what?

A. Pumping water.

Q. Out of wells, or otherwise?

A. From wells.

Q. Was the name of the Veronesi Company that you referred to a moment ago changed at any time?

A. It was changed in 1933, when I became the titular owner.

Q. What was the name of it before 1933?

A. Costruzioni Elettromeccaniche Hugo Veronesi.

Mr. Gray: You might refer to the one before 1933 as Veronesi No. 1, and refer to Veronesi No. 2 as the one after 1933, for our convenience.

Mr. Mellin: All right. It may be so stipulated that we can refer to them that way.

Q. What was the name of the company after you took it over?

A. Costruzioni Elettromeccaniche Veronesi.

(By Mr. Mellin): So the last one we will know as Veronesi Company No. 2.

Mr. Gray: That is right. That will make it easier. [11]

Mr. Mellin: May the interpreter explain to him how we are going to call them?

Mr. Bruce: Yes.

(Unreported discussion.)

(Deposition of Davide Veronesi.)

Q. (By Mr. Mellin): In 1936, did you or did you not spend full time in connection with the business of Veronesi No. 2? A. Completely.

Q. And you are still so interested in the company?

A. Yes, up to this time and today also I am completely interested in the company.

Q. What was the address, the street address, of Veronesi No. 2 in 1936?

A. Via Pietramelara number 4.

Q. Did they move the company from that address at any time after 1936?

A. In '39, the factory was moved from the address just given to Via Franco Bolognese number 4.

Q. That was in what year? A. 1934.

Q. Nineteen thirty what? A. 1939. 1939.

Q. Did they move the factory again after that?

A. No.

Mr. Gray: Mr. Mellin, you have handed me what appears to be a publication, which appears to be printed in Italian. Do you have a translation from the Italian into English of that that you can let us have?

Mr. Mellin: I think I have one. If I have two, I will give you one. [12]

Mr. Gray: I mean, could you let us look at one now?

Mr. Bruce: Did you have that translation?

(Mr. Mellin hands document to counsel.)

(Deposition of Davide Veronesi.)

Mr. Gray: Thank you.

Mr. Mellin: I am just loaning it to you, because it is the only one I have.

(Unreported discussion.)

Q. (By Mr. Mellin): I hand you a four-page printed instrument entitled "Pumpe Eureka," and ask you if you can identify it? A. Yes.

Q. And will you tell us what it is, please?

Mr. Bruce: That is objected to as incompetent. It shows what it is on its face.

Q. (By Mr. Mellin): Will you tell us what it is, please?

A. It is the catalog of the Eureka Pump.

Q. And is that a catalog of the Veronesi Company No. 2 or No. 1? A. No. 1.

Mr. Bruce: Just a moment: We will object to any testimony here as incompetent, irrelevant, and not having been noticed under the provisions of Section 4920, Revised Statutes.

Q. (By Mr. Mellin): Do you know if this catalog was used or not used by the Veronesi No. 2?

A. It was also used by Veronesi No. 2.

Mr. Mellin: May I ask the notary to mark the catalog just identified by the witness for identification as Defendants' Exhibit S? [13]

(Catalog entiled "Pumpe Eureka," marked "Defendants' Exhibit S.")

Q. (By Mr. Mellin): Do you know when the catalog Exhibit S was printed?

(Deposition of Davide Veronesi.)

Mr. Bruce: The same objection to all this testimony, Mr. Mellin.

Mr. Gray: May we have the stipulation that it is deemed objected to, and then you can proceed without interruption?

Mr. Mellin: Yes, I thought we made the stipulation that all objections as to the materiality and relevancy could be held back until the time of trial, except as to the form of the question.

Mr. Gray: And would that also apply to any application of the statute, whether it is 4920 or otherwise?

Mr. Bruce: That is right, 4920, R. S.

Mr. Gray: It includes all legal objections, except as to the form of the question?

Mr. Mellin: Yes.

Mr. Gray: In that way we won't interrupt you.

Mr. Mellin: Will you read the question?

(Record read by reporter.)

A. The answer was 1927 or 1928.

Q. (By Mr. Mellin): When did it first come to your attention? A. About 1930.

Q. Does he know what those catalogs, Exhibit S, were used for by either Veronesi No. 1 or Veronesi No. 2? [14] A. For advertising.

Q. For advertising? A. Yes.

Q. Were or were not they distributed to customers and prospective customers?

A. These were given to customers.

Q. And did he personally have anything to do

(Deposition of Davide Veronesi.)

with either giving them to customers or distributing them to customers? A. Yes.

Q. During what period?

A. From 1933 to 1936 and 1937.

Q. And how many did he so distribute or give to customers?

A. Myself personally, about 150.

Q. How were they given to customers? I mean, handed to them or distributed to them in some other way?

A. Either—they were distributed either by hand or sent through the mail.

Q. Is that a catalog of the Eureka Pump or the Pumpe Eureka, or whatever it is that you mentioned a moment ago that was the product of the Veronesi No. 1 and the Veronesi No. 2? A. Yes.

Mr. Bruce: Have you an extra copy of that, Mr. Mellin?

Mr. Mellin: I think I have. I will have to hunt through a lot of stuff. I will give you a copy of this, and I will give you a copy of the translation. We will have that before the day is over. Some of them I have copies of and some I haven't. I will give you what I have. I may have all of them.

Q. I hand you what appears to be a pamphlet or catalog [15] entitled "Hugo Veronesi, Bologna, Pompe Eureka," and ask you if you can identify it.

A. Yes.

Q. And what is that?

A. It is a catalog of the Eureka Pump.

(Deposition of Davide Veronesi.)

Q. And was that catalog used or not by Veronesi No. 1 and Veronesi No. 2, or either of them?

A. Yes, by—yes.

Mr. Bruce: "Yes" what?

Mr. Mellin: Yes—"Yes" what? By Veronesi No. 1? A. Yes, used by both companies.

Q. And is that a catalog of the Pompe Eureka that he testified to as manufactured by both Veronesi No. 1 and Veronesi No. 2? A. Yes.

Q. And does he know when that catalog was printed? Do you know when that catalog was printed? A. In 1928.

Mr. Mellin: The catalog identified by the witness I ask the notary to mark for identification as Defendants' Exhibit T.

(Catalog entitled "Hugo Veronesi, Bologna, Pompe Eureka," marked "Defendants' Exhibit T.")

Mr. Bruce: Have you a photostat of that, Mr. Mellin?

Mr. Mellin: I may have a copy of it. We can figure out at the end of the day what you will need in the way of copies.

Mr. Bruce: Yes.

Q. (By Mr. Mellin): I notice the address of Hugo Veronesi, Bologna, given here as Via Nuova Fuori Mascarella number 21. [16] When did they move from that address, if they did move?

A. From this address they moved to Via Pietramelara number 4.

(Deposition of Davide Veronesi.)

Q. And when was that move effected?

A. In 1923.

Q. They moved from what address in 1923? This one? (Indicating.)

A. From Via Nuova Fuori Mascarella to Via Pietramelara.

Q. When were these printed? A. In 1928.

Q. Can you explain why they used this same address that they moved from in 1923, in 1928, as I understood your testimony? We must be crossed up. As I understood the testimony this was printed in 1928. Is that correct? A. Yes.

Q. Were they located at this address in 1928?

A. Yes, we were at that address.

Q. When did they move to that address?

The Interpreter: To this address (indicating on catalog)?

Mr. Mellin: Yes. A. 1923.

Q. What year, then—do you know what was done with these catalogs, Defendants' Exhibit T?

A. For advertising.

Q. How were they used for advertising?

A. They were distributed by hand or through the mail to customers.

Q. Of his own personal knowledge how many were distributed to customers in that fashion?

A. Oh, about a hundred. [17]

Q. I call your attention to patent—Italian patent No. 260,417. Do you know the construction and mode of operation of the pump as illustrated in that patent? A. Yes.

(Deposition of Davide Veronesi.)

Q. I call your attention to Exhibit P for identification and ask you to completely disregard the marks in red, and ask you to compare that drawing with the drawing of the patent and tell me if it is the same except difference in size?

A. Yes, it is the same.

Q. Referring to Exhibit P, where does the—what is the part marked Exhibit 9—No. 9?

A. The part No. 9 is the element that sends the water to discharge.

Q. How many stages of pump are shown in Exhibit P, centrifugal?

A. Three phases—three stages.

Q. What is the path of the water that discharges through 9?

The Interpreter: Do you want to indicate the passages?

Mr. Mellin: Well, he can tell us.

A. In the No. 9 there is a discharge, a part of the water discharged goes through No. 9 and the remaining part of the water continues in its successive stages to the jet.

Q. And does the water that discharges through 9 go through all three stages?

A. No. Part of the water goes through 9 and part continues to the other stages.

Q. Does the part that goes through 9 ever go through the [18] other stages? A. No.

Q. Does Exhibit P accurately—strike that. Does the drawing Exhibit P, except for figures, disre-

(Deposition of Davide Veronesi.)

garding figure 3, accurately or inaccurately illustrate Pompe Eureka?

A. It shows how the Pompe Eureka is made, accurately.

Mr. Mellin: Here is a drawing I will ask the notary to mark for identification as "F-A."

(Said drawing marked "Defendants' Exhibit F-A," and later changed to "F-1," and by stipulation of counsel again changed to "P-1.")

Mr. Mellin: I show you a drawing marked for identification "F-A." Does that or does that not accurately illustrate diagrammatically the Pompe Eureka?

A. Yes, it shows it accurately.

Q. Is that drawing—does that drawing F-A for identification illustrate the same or a different construction of centrifugal pump than Exhibit P?

A. It is the same identical pump drawing.

Q. Is that drawing Exhibit F-A for identification the same or different in construction, different from the construction of the Pompe Eureka which we have been discussing? A. Yes, the same.

Q. Calling his attention to the arrows—calling your attention to the arrows in Exhibit F-A, do they correctly or incorrectly show the path of fluid of the Pompe Eureka? A. Yes. [19]

Mr. Gray: Just ask the question one way. That is all right.

Q. (By Mr. Mellin): Does that correctly show the fluid cycle of the Pompe Eureka? A. Yes.

(Deposition of Davide Veronesi.)

Q. Now, I show you Exhibit T, and I call your attention to the picture or illustration on the first page thereof, and ask you if that illustration shows a pump, from its face, of more than one stage?

A. Yes, it shows more.

Q. How many stages? A. Four stages.

Q. Will you mark the stages with a lead line, one, two, three, on Exhibit T?

The Interpreter: There are four stages there, so mark four.

Mr. Mellin: Four stages. Then mark four—mark them one, two, three and four.

(The witness marks on Exhibit T.)

Q. (By Mr. Mellin): O. K. Now, does the pipe which I mark five—what is that? Where does that come from? A. From the first stage.

Q. And is that the one marked "1"?

A. Yes, it belongs to the first stage.

Q. Is that the same or different than the part marked "9" on Exhibit P?

A. It is the same, only that this is a three-stage pump, and that is a four-stage pump (indicating).

Q. O. K. And I mark a pipe "6." What is that pipe? [20]

A. It is the tube that conducts the water to the jet.

Q. And where does tube "6" get its water?

A. The tube No. 6 gets its water from the fourth stage.

Q. I call your attention to the last page of Ex-

(Deposition of Davide Veronesi.)

hibit T. How many stages is that, if it is more than one?

A. It has more than one stage. It has three stages.

Q. Will you mark the stages one, two, and three, please?

(The witness marks as requested.)

Q. And I mark a pipe "5" and ask what is that pipe? A. It is a discharge tube.

Q. And where does it get its water?

A. From the first stage.

Q. I mark a tube "6." What is that tube?

A. It is a tube that conducts the water to the jet.

Q. And that jet is at "7" here. A. Yes.

Q. And where does the tube "6" get its water?

A. From stage number three.

Mr. Mellin: Let's take a five-minute recess.

(Short recess.)

Mr. Mellin: I identified the drawing, the large drawing to which the witness testified, as Defendants' Exhibit F-A. May it be stipulated that that can be changed to F-1 for identification?

Mr. Gray: So stipulated.

Mr. Mellin: All right. Let's make it P-1 instead of F-1. Is that satisfactory? [21]

Mr. Gray: Yes.

Mr. Bruce: That is agreeable.

(Said drawing re-marked "Defendants' Exhibit P-1.")

(Deposition of Davide Veronesi.)

Q. (By Mr. Mellin): I call your attention to an assembled pump casing, which I ask the notary to mark for identification as Defendants' Exhibit U-1. Do you know where that assembled pump casing came from? A. From the Veronesi factory.

Q. And when were the parts of that casing other than the bolts made, if you know? A. In 1937.

Q. And were those parts ever in use?

A. No.

Q. Are they the same or different from the parts from which the Pompe Eureka was made?

A. They are the same parts as used in the construction of the Eureka Pump.

Q. That is, the same in design and construction?

A. Yes.

Q. And when were those parts put together in the fashion they are now put together, other than being cut away?

A. They were put together from old parts just before I left.

Q. Well, you mean by "I left," when you left Italy to come over here? A. Yes.

Q. And if he knows, who cut the chunk out of it.

(The interpreter speaks with the witness.)

The Interpreter: He thinks it has been done by the [22] Berkeley firm.

Q. (By Mr. Mellin): He had no part in that?

A. No.

Q. Comparing the pump casing Exhibit U-1 with the drawing of the centrifugal pump "P," is the

(Deposition of Davide Veronesi.)

casing on the drawing the same as the pump casing U-1 or different? A. There is no difference.

Q. Does the drawing Exhibit P accurately or inaccurately illustrate the pump casing U-1?

A. Yes, completely and accurately.

Q. And will you look at the part that was cut away and tell us if that is the missing part—the cut-away part of the casing U-1?

Mr. Bruce: Pardon me. There was so much noise I didn't hear the question.

Mr. Mellin: I just asked him, is the part marked for identification U-2 the part that was cut away from the casing U-1?

Mr. Gray: It is stipulated that it was.

Mr. Mellin: All right.

Q. Now, from 1936 to the present who was in charge of the records of Veronesi No. 2?

A. Me.

Q. With reference to the pump casing U-1, when were the patterns—do you know when the patterns were made for those castings?

The interpreter: For the castings? [23]

Mr. Mellin: Yes.

A. I believe my father had them made in either 1920 or 1921.

Q. Was the Pompe Eureka pump design changed at any time? Was it changed from 1933 to 1939 from the construction of design shown in U-2?

A. No, no change.

Mr. Bruce: What date was that?

Mr. Mellin: I asked from 1933.

(Deposition of Davide Veronesi.)

Mr. Gray: After 1933.

Mr. Bruce: All right.

Q. (By Mr. Mellin): And the catalogs Exhibits S and T, were they taken from the records of Veronesi No. 2 or not?

The Interpreter: These publications (indicating)?

Mr. Mellin: Yes.

A. They were taken from the archives of Veronesi No. 2.

Q. Was the discharge to service always located at the first stage— Just strike that.

Were any Pompe Eurekas made which had but one discharge? A. No.

Q. Did they make centrifugal pumps other than Pompe Eureka?

The Interpreter: Centrifugal?

Mr. Mellin: Yes.

A. No.

Q. Did they separately make a centrifugal pump? I think we have got that question confused. [24]

A. They manufactured centrifugal pumps, the ordinary centrifugal pumps for normal uses, with one suction port and one discharge port.

Q. Were they called Pompe Eureka?

A. No, they were not.

Q. Did they make different combinations of two discharges in Pompe Eureka?

The Interpreter: A combination of discharges?

Mr. Mellin: Different combinations of discharges.

(Deposition of Davide Veronesi.)

A. They made pumps whereby the discharge would be in different positions.

Q. I show you a Pompe Eureka on Exhibit S. Where is the discharge to the jet on that pump, if it has a discharge to the jet?

Would you mark that——

Mr. Gray: You can mark it.

Q. (By Mr. Mellin): Is that the one I marked "2," discharge to the jet? A. Yes.

Q. And how many stages is that pump?

A. Four stages.

Q. And the one I mark "1" is the first stage or not? A. Yes.

Q. And the one I mark "1-A" is what stage?

A. The second stage.

Q. And the one I mark "1-B"?

A. The third stage.

Q. And the one I mark—am I going to mark it?

Mr. Gray: That is not a stage, is it? [25]

Q. (By Mr. Mellin): The one I mark—is that a stage (indicating)? A. The fourth stage.

Mr. Mellin: That is "1-C."

Q. And what I mark No. 3—is that a discharge or an inlet? A. Discharge.

Q. And that is at the last or fourth stage?

A. The last stage. It comes from the last stage.

Q. And that is to service?

A. This one, yes.

Q. And No. 3 is to service—to use?

A. Yes.

Q. And the connection I mark "4," suction?

(Deposition of Davide Veronesi.)

A. Yes, suction.

Q. All right. Now, I call your attention to the illustration on the second page of Exhibit S. Is that the same or different from the illustration on the second page—on the last page of Exhibit T?

A. The same.

Q. The same illustration? A. Yes.

Q. Of the same pump? A. Yes.

Q. How many stages — what is the maximum number of stages they used in Pompe Eureka, if he knows?

A. I believe we arrived in making pumps of eighteen stages.

Q. And were all Pompe Eureka pumps made laminated—that is, by laminated meaning each stage being separate, a separate lamination?

The Interpreter: Now, lamination — is that a quality of the manufacturer? [26]

Mr. Mellin: No. It is each stage made as a separate unit. Ask him if each stage was or was not always made as a unit—each pump stage or section?

(The interpreter speaks with the witness.)

The Interpreter: He says each stage was made in such a manner that they could be interchangeable.

Q. (By Mr. Mellin): And added to or subtracted from? A. Yes.

Q. So as to make different numbers?

A. Yes.

Q. So pumps of more than two stages just meant adding additional elements or assemblies—may I strike the question?

(Deposition of Davide Veronesi.)

Mr. Bruce: That would be true in any case.

Mr. Mellin: Yes.

Q. Does the drawing Exhibit P show it made in the manner he just described? A. Yes.

Q. You handed me on your arrival in the United States a drawing which is labeled "Dis. 1317, Hugo Veronesi," and it has a date in its lower right-hand corner of "Bologna, 1926." What is the purpose of that drawing?

A. This is furnished to the clients as an aid to installation as to the height and the space displaced and occupied by the machine.

Q. And where did he obtain that drawing?

A. From the records of the firm.

Q. And when did that come into his possession for the first time, if he knows?

A. When I became the titular owner [27] of the plant this was in the archives and came to me in that way.

Q. And that was in 1933? A. In 1933.

Q. Was that drawing itself furnished to customers, or reproductions of it?

A. Blueprints made of this design were furnished to the customers.

Q. And did he furnish any such blueprints to customers? A. Yes.

Q. How many? A. Oh, around ten.

Mr. Mellin: I will ask the notary to mark that drawing the next in order for identification.

(Said drawing marked "Defendants' Exhibit V.")

(Deposition of Davide Veronesi.)

Q. (By Mr. Mellin): Calling your attention to Exhibit V, and particularly to arrows thereon, what do those arrows indicate?

A. The arrows point to the course of the water to the discharge and to the jet.

Q. You handed me a drawing labeled "Pompe Centrifuga," I guess it is, dated in 1928. Where did you obtain that drawing?

A. In 1923 when I became the titular owner of the firm.

Mr. Bruce: 1923 or 1933?

The Interpreter: 1933.

Q. (By Mr. Mellin): Is this drawing an accurate drawing of various sections of pumps made by Veronesi No. 1 and Veronesi No. 2? A. Yes.

Q. This only has two discharges—I beg your pardon. I [28] am misstating it. This only has one discharge as shown on this drawing. A. Yes.

Q. Did you attempt to locate a separate drawing of an intermediate discharge?

A. Yes, but we haven't any drawings showing the intermediate discharge.

Q. Did he ever have drawings showing them?

A. No.

Q. How was that intermediate discharge section made?

A. It was a piece attached with an outlet that could be placed in between.

Q. With intermediate outlets?

A. With intermediate position.

(Deposition of Davide Veronesi.)

Mr. Bruce: Are you identifying that drawing?

Mr. Mellin: Yes, I am going to offer in evidence the drawing referred to by the witness—I will ask it be marked for identification next in order. This is a drawing labeled, "Pompe Centrifuga, 1926," the drawing being identified by the number——

Mr. Bruce: 1928, rather than 1926, isn't it?

Mr. Millin: Yes, I beg your pardon. The drawing being identified by number, apparently No. Dis. 256.

(Drawing entitled "Pompe Centrifuga, 1928," marked "Defendants' Exhibit W.")

Q. (By Mr. Mellin): I show you a drawing just handed me, which is numbered "Dis."—this is "Nr. 313," dated 18/4/38, and ask you if that is a drawing of an intermediate discharge section [29] of a pump?

Mr. Bruce: Mr. Mellin, May I see that a moment?

Mr. Mellin: Yes.

Mr. Bruce: All right. Thank you.

Q. (By Mr. Mellin): And I will ask you if that is a drawing of an intermediate discharge section?

A. Yes.

Q. I notice it has volute vanes on it, or blades. Did the Pompe Eureka have volute vanes or vanes?

The Interpreter: Volute or involute?

Mr. Mellin: Well, call them curved.

A. Normally this pump was manufactured with the straight vanes, but this pump made according to

(Deposition of Davide Veronesi.)

this—we only made one pump designed according to this drawing.

Q. And that had curved vanes? A. Yes.

Q. Did you search for a drawing of an intermediate discharge section like this with straight vanes to bring here or not?

(The interpreter speaks with the witness.)

The Interpreter: He looked for them, but he couldn't find them because they were destroyed.

Q. (By Mr. Mellin): Ask him to explain the manner in which they were destroyed or lost, whatever it was.

A. The factory was bombarded during the war. The place was left open, and anybody could have entered and probably picked anything up they wanted. After that bombardment the [30] place was, as I understand, abandoned, and it was open to anybody to enter.

Q. And some records were lost? Were some records lost or not?

A. We lost documents and copies of—invoice copies, invoice registers.

Q. And drawings? A. And drawings.

Q. Other than the fact that the vanes are curved, does this accurately illustrate a part of Pompe Eureka?

A. This drawing represents the intermediate discharge stage of a Eureka Pump.

Q. Other than the curved vanes?

A. Other than the curved vanes.

(Deposition of Davide Veronesi.)

Mr. Mellin: I will ask this be marked for identification next in order.

(Drawing, Nr. 313, dated 18/4/38, marked "Defendants' Exhibit X.")

Q. (By Mr. Mellin): You handed me a drawing which is labeled, "Pompe Centrifuga Eureka," which is dated in the lower right-hand corner, 8/12/1923. Where did you obtain that drawing?

A. From the company's records.

Q. And when did that come into his possession?

A. When I became the legal titular owner of the firm.

Q. In 1933? A. 1933.

Q. And it has been in your possession ever since?

A. Yes.

Q. I notice that that has one, two, three, four stages. [31] Is that correct?

A. It has four stages.

Q. Other than the four stages is there any difference between the pump there shown and the pump illustrated in Exhibit P-1—either "P" or "P-1"?

A. No difference.

Q. Where did the discharges come off there?

A. From the first stage.

Q. And was there more than one discharge?

A. There was another discharge leading to the jet.

Q. Is that the one indicated in dotted lines on the drawing?

A. From the fourth stage the water was con-

(Deposition of Davide Veronesi.)

ducted along the pipe indicated by the dotted line to the jet.

Mr. Mellin: I ask that this drawing be marked for identification next in order.

(Drawing entitled "Pompe Centrifuga Eureka," dated 8/12/1923, marked "Defendants' Exhibit Y.")

Q. (By Mr. Mellin): Were any changes made, to your knowledge, on Exhibit Y for identification after the exhibit came into your possession?

A. None, no.

Q. I hand you three drawings numbered Dis. 1510, 1511 and 1512, which you handed me, and ask you where you obtained those drawings?

A. From the company's records.

Q. And when did they come into your possession? [32]

A. In 1933.

Q. Do they illustrate installations of Pompe Eureka pumps or not?

A. Yes. They were designs given to the customers to take off measurement for space required, and showing the function of the pump.

Q. The blank spaces that I point to, which are in solid black—what are those for?

A. This black mark was blocked out for the purpose of reproducing a white space on the blueprint so the numbers could be written in in the white space on the blueprint.

Q. And were there more than one of each of

(Deposition of Davide Veronesi.)

these or not? Were any of these furnished to customers, any of those particular reproductions?

A. Yes, they were furnished to the clients.

Q. Did he personally ever furnish any prints of these drawings to clients?

A. Yes, some I furnished, but not many.

Mr. Mellin: I offer those three drawings as our next exhibit in order for identification.

Mr. Bruce: Maybe you had better mark them with numbers also in order to identify them.

(Drawings numbered Dis. 1510, 1511 and 1512, marked "Defendants' Exhibits Z-1, Z-2, and Z-3 for identification.")

Q. (By Mr. Mellin): I hand you a drawing numbered Dis. 1459, and ask you where you obtained that. You handed it to me.

A. From the company records. [33]

Q. And how long has that been in your possession? A. From 1933.

Q. Does that show an installation of the Pompe Eureka? A. Yes.

Q. For a particular customer or not?

A. No, this is not for a particular client. This could have been used for more than one—for several customers.

Q. What was this drawing used for?

A. This shows an installation of a pump with a storage tank and connected up with electric power with an automatic switch.

Q. And what was the drawing itself used for?

(Deposition of Davide Veronesi.)

A. To exhibit it as a mode of installation to several customers.

Q. Were or were not the customers given copies?

A. Yes.

Q. By him personally?

A. Also by me personally.

Q. How many? A. Five or six.

Q. When?

A. In 1935 or '36—about those years.

Q. Did Veronesi No. 2 manufacture or sell any Pompe Eureka pumps after 1939? A. No.

Q. At that time did they go out of the pump business?

A. We had quit manufacturing any pumps, completely.

Q. How many stages are shown in that drawing you were just looking at? A. Two stages.

Q. From what stage is the discharge to the tank? [34]

A. From the first stage.

Q. And where is the discharge to the jet?

A. In the second stage.

Mr. Mellin: May I have that drawing marked for identification next in order?

(Drawing numbered Dis. 1459, marked "Defendants' Exhibit AA for identification.")

Q. (By Mr. Mellin): I hand you what appears to be a filing receipt for a patent application, stating, "Applicant, Veronesi, Hugo, Bologna, Italy; invention, devices for raising liquids"; addressed to

(Deposition of Davide Veronesi.)

Marks & Clerk, 715 "G" Street, N. W., Washington, D. C., serial No. 467053, series of 1925; filing date July 10th, 1930——

Mr. Bruce: July 10th?

Mr. Mellin: Yes, July 10th, 1930.

Mr. Bruce: 1930. All right.

Q. (By Mr. Mellin): And I ask you, is the Hugo Veronesi mentioned therein your father?

A. Yes.

Q. And where did you obtain this filing receipt? You handed it to me yesterday.

A. This was given to me by my father before I left Italy, to show what the receipt reflects.

Mr. Mellin: May I have that marked for identification next in order?

(Filing receipt for patent application marked "Defendants' Exhibit BB for identification.")

Q. You handed me yesterday a book which bears on the front the date of 18/11/1933, and has some other figures on it. Will you tell us what that is, please?

A. This is a copy book wherein all invoices were copied.

Q. All invoice of Veronesi——

A. Of Veronesi, yes—of the Veronesi Company No. 2.

Q. No. 2. And I notice—did you place all those papers into that book? A. Yes.

Q. And what do those pages indicate that are marked by those little pieces of paper?

(Deposition of Davide Veronesi.)

A. The signs indicate the pages upon which there is a copy of an invoice of a Eureka Pump.

Q. An invoice of a sale of a Eureka Pump?

A. Yes.

Q. By Veronesi? A. By Veronesi No. 2.

Q. And the invoice appearing on page 30 is a copy of such an invoice? Ask him if each page that I refer to and identify by number in the upper right-hand corner—do I understand correctly that each of such pages is an invoice for a Eureka Pump by Veronesi? A. Yes.

Q. Page 30, page 34, page 36, pages 45 and 46, page 57, 61, 68, 76, 90, 92, 93, 94, 129, 135, 143, 145, 156, 173, 216, 217, 262, 337, 349, 356, 370.

Each of those pages that I showed you and called out are numbered invoices for sales of Pompe Eureka by Veronesi? [36] A. Yes.

Q. I notice these records are only from 1933 to 1939. Did you have any other sales records like that?

A. There were sales previous to 1933 also.

Q. What became of the records?

A. They were lost also.

Mr. Mellin: I offer the book produced by the witness for identification as defendants' exhibit next in order, but just as to those pages which I referred to, and I ask the notary to so mark it.

(Book entitled "Copia Delle Fatture, dal 18/11/1933 al 11/9/39," marked "Defendants' Exhibit CC for identification.")

Mr. Mellin: That closes my examination.

(Thereupon, at 12:45 p.m., Tuesday, May 3rd, 1949, an adjournment was taken until 2:00 o'clock p.m. of said day, and by consent of counsel to be resumed at the same place.) [37]

Office of Messrs. Mellin and Hanscom,
Suite 500, 391 Sutter Street,
San Francisco, California,

Tuesday, May 3rd, 1949, 2:25 o'Clock P.M.

(Pursuant to the foregoing adjournment, at the above time and place the following proceedings were had; there being the same appearances as hereinbefore noted.)

Mr. Gray: Do we have an understanding as to whether we are going to get all of these things, a copy of the things that you have introduced?

Mr. Mellin: We have no copies of a drawing except I may have a small one like the other. If we have them, you can have a copy; otherwise you can have copies made.

Mr. Gray: All right. You will either furnish us with copies of all of the exhibits you have offered for identification or——

Mr. Mellin: Or we will give it to the notary, and he will reproduce it for you.

Mr. Gray: In that way we will get them in one way or the other?

Mr. Mellin: That is right. When you are ready, I have to ask one question on that patent up there. When you are ready, we will go.

Mr. Gray: With relation to 260,417? [38]

Mr. Mellin: Yes. All set?

Mr. Bruce: Go ahead.

DAVIDE VERONESI

recalled as a witness, having been previously duly cautioned and sworn by the notary public to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination
(Resumed)

By Mr. Mellin:

Q. In taking your testimony this morning, you were asked where you obtained the document I have as "Q"; and you answered Rome. Do you wish to correct that statement?

A. He said he replied Rome because the patent office is in Rome; and the patent really came from Rome; but he has had this document in his company records as long as the patent was issued; and before coming to America, he took this document from the company records.

Mr. Mellin: That is all. Then "this document" refers to Exhibit for identification Q, Patent No. 260,417.

The Witness: Yes.

Mr. Bruce: Your testimony in chief is closed?

Mr. Mellin: Yes.

Mr. Bruce: We discussed this morning about the matter of holding the witness over for signature to his deposition.

Mr. Mellin: Yes. [39]

(Deposition of Davide Veronesi.)

Mr. Bruce: And I really think there is no need of that; so we will stipulate that it may be——

Mr. Mellin: The signing waived?

Mr. Bruce: The signing may be waived.

Mr. Mellin: Yes.

Mr. Bruce: All right. Now, we have considered the testimony given here; and we feel that such testimony is incompetent, irrelevant and immaterial; and we feel that our objections made this morning are sound; and we do not desire to cross-examine.

Mr. Mellin: No further questions.

/s/ JAY DAVIDE VERONESI.

State of California,
Northern District of California,
City and County of San Francisco—ss.

I hereby certify that on Tuesday, the 3rd day of May, 1949, commencing at 10:00 o'clock a.m., before me, Violet Neuenburg, a notary public in and for the City and County of San Francisco, State of California, at the office of Messrs. Mellin and Hanscom, Suite 500, 391 Sutter Street, San Francisco, California, personally appeared pursuant to Notice of Taking Deposition, hereto annexed, Davide Veronesi, a witness called on behalf of the defendants herein; and Charles O. Bruce, Esquire, and Nathan G. Gray, Esquire, appeared as attorneys for the plaintiff; and Messrs. Mellin and Hanscom, represented by Oscar A. Mellin, Esquire, and Jack E. Hursh, Esquire, appeared as attorneys for the de-

fendants; and the said Davide Veronesi being by me first duly cautioned and sworn, through the interpreter, Camillo Marzo, to testify the truth, the whole truth, and nothing but the truth, and being carefully examined, deposed and said as appears by his deposition hereto annexed.

And I further certify that the said deposition was then and there recorded stenographically by Harold H. Hart and R. R. Roberson, competent official and disinterested shorthand reporters, appointed by me for that purpose and acting under my direction and personal supervision, and was transcribed by them; and I further certify that at the conclusion of the taking of said deposition, and when the testimony of said [41] witness was fully transcribed, said deposition was submitted to the said witness and was interpreted to the said witness by said interpreter, Camillo Marzo, and being by the witness in that manner read was corrected and signed by him in my presence; and I further certify that the deposition is a true record of the testimony given by the said witness.

And I further certify that the said deposition has been retained by me for the purpose of securely sealing it in an envelope and directing the same to the clerk of the court as required by law.

And I further certify that I am not of counsel or attorney for either or any of the parties, nor am I interested in the event of the cause; I further certify that I am not a relative or employee of or attorney or counsel for either or any of the parties, nor a

relative or employee of such attorney or counsel, nor financially interested in the action.

In Testimony Whereof, I have hereunto set my hand and official seal at the City and County of San Francisco, State of California, this 5th day of May, A.D. 1949.

/s/ VIOLET NEUENBURG,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires January 3, 1951.

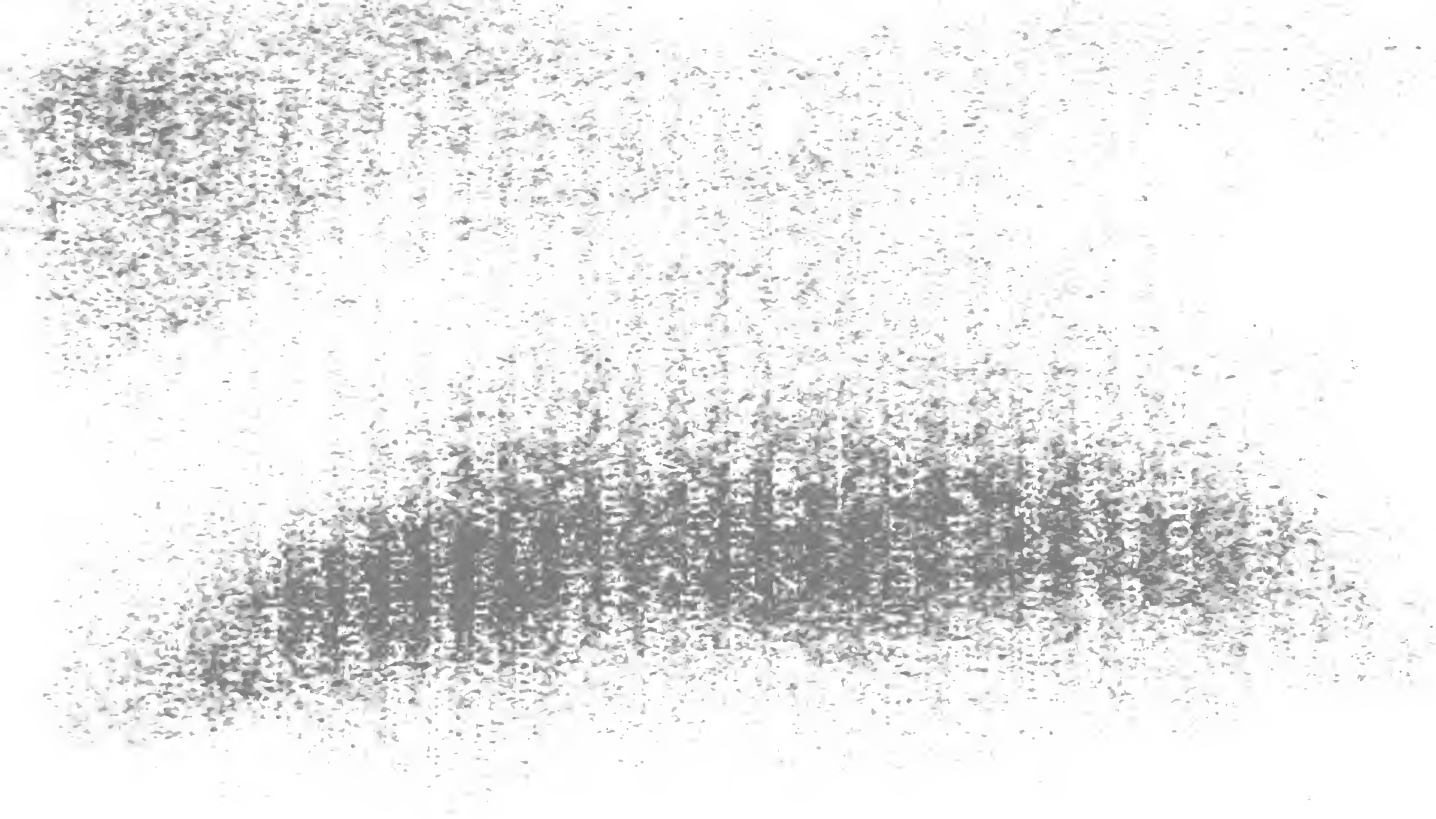
[Endorsed]: Filed U.S.D.C. May 9, 1949.

[Endorsed]: Filed U.S.C.A. October 18, 1950.

[Endorsed]: No. 12540. United States Court of Appeals for the Ninth Circuit. Jacuzzi Bros., Incorporated, a Corporation, Appellant, vs. Berkeley Pump Company, a Corporation, Berkeley Pump Company, a Partnership, and Fred A. Carpenter, Lana L. Carpenter, F. F. Stadelhofer, Estelle E. Stadelhofer, Jack L. Chambers, Wynnie T. Chambers, Clemens W. Laufenberg and Marie C. Laufenberg, Partners Associated in Business under the Fictitious Name and Style of Berkeley Pump Company, Appellees. Supplemental Transcript of Record. Appeal from the United States District Court, Northern District of California, Southern Division.

Filed October 18, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the Court of Appeals for the Ninth Circuit.



No. 12,540

IN THE

United States Court of Appeals

For the Ninth Circuit

JACUZZI BROS., INCORPORATED (a Corporation),

Appellant,

vs.

BERKELEY PUMP COMPANY (a Corporation), BERKELEY PUMP COMPANY (a Partnership), and FRED A. CARPENTER, LANA L. CARPENTER, F. F. STADELHOFER, ESTELLE E. STADELHOFER, JACK L. CHAMBERS, WYNNIE T. CHAMBERS, CLEMENS W. LAUFENBERG and MARIE C. LAUFENBERG, partners associated in business under the fictitious name and style of Berkeley Pump Company,

Appellees.

OPENING BRIEF ON BEHALF OF APPELLANT.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Statutes

Rules

Texts

No. 12,540

IN THE

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JACUZZI BROS., INCORPORATED (a Corporation),

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Appellees.

OPENING BRIEF ON BEHALF OF APPELLANT.

This case comes before this Court on an appeal from a final judgment of the United States District Court for the Northern District of California, Southern Division, adjudging United States Letters Patent No. 2,344,958, issued March 28, 1944, and United

States Letters Patent No. 2,424,285, issued July 22, 1947, invalid and void in law.

I.

JURISDICTIONAL STATEMENT.

The District Court had jurisdiction under Section 24(7) of the Judicial Code as amended (28 U.S.C., Section 41(7), and under Section 247D of the Judicial Code (Federal Declaratory Judgments Act, 28 U.S.C., Section 400), as the suit was one for infringement of United States letters patent (R 2) and the answer (R 12) incorporated a counterclaim for a declaratory judgment involving the validity of such patents.

Jurisdiction is conferred upon this Court to review the final judgment of the District Court by virtue of 28 U.S.C., Section 1291 (New Judicial Code).

The final judgment of the District Court was entered March 20, 1950 (R 94), and the Notice of Appeal on behalf of the appellant herein was filed April 11, 1950 (R 97), and well within the thirty day period required by 28 U.S.C., Section 2107, and Rule 73 of the Rules of Civil Procedure of the District Courts of the United States.

II.

STATEMENT OF CASE.

The plaintiff*, JACUZZI BROS., INCORPORATED, a California corporation, is the owner of the two patents in suit. The defendants are BERKELEY PUMP COMPANY, also a California corporation, its predecessor in business, BERKELEY PUMP COMPANY, a partnership, and the individual members of such partnership.

Plaintiff's complaint in the Court below charged the defendants with infringement of its two patents, which charge it subsequently limited to Claims 3, 9 through 13, 17 and 18 of patent 285 (R 497), and Claims 1, 2, and 4 through 9 of patent 958 (R 504). By their answer, the defendants asserted the customary defenses of invalidity and non-infringement, and in addition the defendant corporation counterclaimed for a declaratory judgment of invalidity and non-infringement of the two patents *in toto*.

After trial the District Court rendered a memorandum decision, which decision, by order of such Court (R 99), is incorporated in full and forms a part of the written findings of fact and conclusions of law.

Basically, the Court found with respect to both patents that while all the claims sued on, with the

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*For the sake of convenience, we shall hereafter refer:
To the appellant as the "plaintiff";
To the appellees as the "defendants";
To patent No. 2,424,285 as "patent 285";
To patent No. 2,344,958 as "patent 958";
To the transcript of record by the letter "R" followed by the number of the page referred to;
And all underlinings or italics shall be deemed ours unless otherwise noted.

exception of Claim 11 of patent 285, *were clearly infringed if valid,* some of the claims including Claim 11 were anticipated, and that all claims charged to have been infringed as well as those not relied on by plaintiff were void for lack of invention over the prior art. By its final judgment duly entered the District Court adjudged all the claims of both patents invalid and void in law, and from such judgment plaintiff has appealed.

Because of the well-recognized rule that letters patent are *prima facie* valid and that the party asserting the contrary has the burden of establishing invalidity by evidence carrying conviction beyond a reasonable doubt, the questions for this Court to decide are: Have the defendants sustained the heavy burden of showing beyond a reasonable doubt—

(a) That as to those claims found void for anticipation, the anticipatory references or reference clearly show on their face, without the necessity for modification or the drawing of post mortem inferences, the same knowledge and directions as the patents in suit;

(b) That it did not require the exercise of invention on the part of the patentees of the patents in suit to make their admitted advance beyond the systems known when they entered the field.

If defendants have failed to do this, indeed if the proofs leave a reasonable doubt as to these questions, this Court must, upon the issues presented, order reversal of the District Court as to all claims, except

Claim 11 of patent 285, and even as to such claim, if the District Court's finding of non-infringement thereof be shown to be clearly erroneous.

The courts have repeatedly held that to *anticipate* an invention it is necessary that all the elements of the invention or their equivalents be found in one single description or machine where they do substantially the same work in substantially the same way, and that inferences, as distinguished from disclosure, especially when drawn in the light of after-events, cannot be accepted as a basis for anticipation. Furthermore, the courts have never sanctioned the proposition that the question of invention is one of mere arbitrary opinion.

Want of invention must be *proved beyond a reasonable doubt* by the proof of facts and circumstances demonstrating that the steps taken by the alleged inventor were those which any person skilled in the art would have taken under similar circumstances at the time and not in the floodlight of subsequent events.

Preliminary to discussing the judgment and findings of the District Court, it is necessary to first examine the patents in suit and consider the character and scope of the inventions which they disclose.

The Patents in Suit.

Plaintiff's patent 285 issued July 22, 1947, upon application filed May 31, 1941. Patent 958 issued March 28, 1944, upon application filed July 15, 1941, and is a *continuation-in-part* of the first filed application. The two applications were *co-pending* in the

Patent Office for more than 2½ years and during such co-pendency the Patent Office required and the patentees maintained a line of division between them. In connection with this line of division, the generic claims appear in the first filed application which matured in patent 285, and being generic, cover the broad aspects of the improved system of the second patent 958 but not specifically the self-balancing feature thereof, to which the claims of the second patent 958 are directed.

Of plaintiff's two patents, the last to issue was based upon the application first to be filed. While simultaneous issuance of the two applications was requested of the Patent Office, the first filed application was held up by an interference with defendants' later filed RHODA patent No. 2,315,656 (R 536) on an invention both were laying claim to, but which defendants, as the assignee of RHODA, the losing party, now allege to lack invention.

The Inventions Involved.

The inventions involved in plaintiff's patents relate broadly to water systems for use by residents of rural districts where city water service is not available, and such inventions are more specifically concerned with improvements in water systems employing the injector principle, and thus the claims thereof are limited to a narrow field in a crowded art, and their terminology is not so broad as to encompass the pump art in general.

The problems created by the employment of the injector principle, and which are not involved in other

type systems, are well pointed out in the specifications of plaintiff's patents and in the District Court's Memorandum Decision, and reference thereto will show that such problems are inherent in systems employing such principle.

Briefly, such problems are created because the injector assembly requires, for continued operation of the system, a minimum volume and pressure of water determined by the existing water level in the well, and such water must be diverted from the otherwise available output of the pump unit assembly. Such injector assembly requirements become greater with a drop of water level in the well or an increase in service load, and failure to supply the increased requirement causes the injector assembly to cease functioning and the pump to lose its prime and stall. The requirements of the injector assembly, thus being of primary consideration, created in conventional systems many additional problems with resulting limitations all as pointed out in the specifications of plaintiff's patents.

The patentees of the patents in suit substantially advanced the art by their improved systems and not only overcame many of the objections and limitations of the existing conventional systems but, in addition, produced improved results as well as new results, such being pointed out in the specifications of plaintiff's patents and particularly in the objects of the inventions therein set forth.

Plaintiff's patent 285 involves generally two different system combinations, which, for convenience, we will designate as system combinations A and B.

The system of combination A is covered by Claims 1, 2, 3, 6, and 9 through 13. All of such claims, except 1, 2 and 6, were charged as being infringed by defendants. The system of combination B is covered by Claims 17 and 18 and were likewise charged as being infringed.

Claims 4, 5, 14, 15 and 16 are drawn to the pump unit assembly as a component of the system combinations A and B and constitute subcombination claims. Similarly, Claims 7 and 8 are drawn to the pump stage assembly which provides low pressure discharge in combinations A and B, and likewise constitute subcombination claims. None of the subcombination claims was involved in plaintiff's charge of infringement. Such subcombination claims the patentees had the right to make under the law *(Walker on Patents,* Deller's Edition, Vol. 2, Sec. 166, Page 789).

The invention of system combination A involves an *injector* type system which will economically provide *direct* discharge to service over a *wide* range of pressures and volumes, whereby the consumer can draw water to *directly* meet any of the many requirements demanding different pressures and volumes. Of primary significance is the fact that the new system will directly provide *large* volumes of water at extremely *low* or even *zero* pressure for *irrigation,* thus eliminating the former uneconomical and inefficient procedures of taking water for irrigation from either the suction line or from the pressure tank of an injector

type pressure system, or of using two separate pumps or pump systems.

This has been made possible by the discovery of the patentees of plaintiff's patents that in a water system of the *injector* type, with a *properly designed* pump unit of the impeller type, such as illustrated in both plaintiff's systems and defendants' accused systems, discharge at low pressure may be taken from an intermediate stage of the pump unit *without adversely affecting the rest of the system.* In addition, the patentees found that their discovery resulted in a system which could deliver large volumes of water at such low pressures, which admirably satisfies conditions for irrigation, this being clearly illustrated by the *graph, Fig. 4 of patent 285.*

Thus the farmer can now enjoy, as a result of this invention, the advantage of obtaining a *copious* discharge *directly* at the pressure he desires, and no longer need he:

(1) Incur the expense of first raising all of this water to the pressure required by the injector assembly and then dropping the pressure back to the low value desired for irrigation and thereby saving 30% to 50% in power bills (R 483);

(2) Take his irrigation supply from the pressure tank and thus adversely expose the service line and household water pressure to heavy pressure fluctuations and frequent failures (R 214);

(3) Incur the expense of two separate pumps or pump systems (R 523, 530).

The invention of system combination B involves a *dual purpose pressure* system which can:

(1) *Simultaneously* supply both the high pressure-low volume requirements of the household and the large volume-low pressure requirements of irrigation (R 458); and in addition

(2) Provide *automatic* pump starting from *either* discharge (R 115, 457, 458).

This, the patentees of patent 285 accomplished through not only recognizing but taking advantage of the phenomenon that during *quiescent* periods of the pump unit in a conventional type *pressure* system, the tank pressure will equalize or spread throughout those portions of the pressure system which happen to be in open communication with the pressure tank. Thus by removing check valves previously employed in the discharge line to the pressure tank, and by the avoidance of any other valves which might otherwise block off open communication from the pressure tank to the spigot at the discharge end of the irrigation line, the conventional pressure switch already associated with the pressure tank will then be made responsive, not only in the conventional manner to pressure changes in the pressure tank brought about by demand on the part of the household, but now also to pressure changes brought about through opening of the spigot at the remote end of the irrigation line.

Therefore, *a mere opening of the spigot at the end of the irrigation line* during quiescent periods of the

pump unit will *automatically* bring about the starting of the pump unit, and it is not necessary to walk all the way back to the pump unit to throw a switch or manually operate any control for this purpose (R 115). It now becomes apparent that no additional electrical equipment or electrical installation is necessary, for, without any changes in the electrical system whatever, the *same* pressure switch, though adjusted for the higher pressures utilized in the household, is now also without change in adjustment, made to respond to opening of the low pressure discharge (R 115).

Plaintiff's patent 958, the application of which was co-pending with and a continuation-in-part of the application of patent 285, involves a third novel combination which we will hereafter refer to as system combination C, and is covered by Claims 1 through 9, of which all but Claim 3 are charged to be, as well as found by the District Court to be infringed by defendants' accused systems.

The invention of combination C pertains to an *injector* type system which is self-balancing and consequently *inherently stable*. Accordingly, this system is not subject to failure within a wide range of changes in operating conditions to which pump systems are exposed.

In this connection, the system described in the earlier filed patent 285 still requires a control valve. Patent 958, on the other hand, provides a system which is entirely self-balancing and no longer requires a control valve. At the same time this system retains

all of the beneficial and advantageous features covered by patent 285.

To the farmer, this added feature means:

(1) The elimination of many hours of labor previously required in adjusting a control valve to place an injector type system into operation; with a corresponding savings in labor costs (R 215-217, 458-461);

(2) The discharge pipes or service lines, being free of control valves, are, therefore, unrestricted and can deliver to full capacity, meaning greater and unrestricted output to service (R 217);

(3) Continuous service to the farmer (R 458-462, 483-484) in spite of any wide changes in operating conditions such as receding water level and the like (R 136), with resulting savings in operating and maintenance costs;

(4) Complete elimination of control valves from the system and the cost thereof (R 136, 458).

The self-balancing feature has its origin in the *discovery* by the patentees that, in a pump system employing the *injector* principle, if the injector assembly were supplied from a stage of the pump unit *other* than those from which the service discharge is taken and flow of water to the injector were *favored* over flow to service, the pump unit will automatically meet the changing requirements of the injector assembly with changes in conditions within the well, and thus eliminate the principal cause of a pump system losing its prime and becoming inoperative.

III.

SPECIFICATION OF ERRORS.

The asserted errors of the District Court that are relied upon by the plaintiff are as follows:

The Court erred:

1. In failing to accord to the VERONESI (1927) Italian patent, the teachings thereof as clearly expressed by the inventor himself;

2. In finding an asserted flaw in plaintiff's arguments before the Patent Office on the irrelevancy of the VERONESI (1927) patent, since such flaw is by the District Court predicated upon an erroneous premise as to what such patent was directed (Decision, R 70);

3. In finding that the VERONESI (1927) patent clearly discloses the *precise* system of plaintiff's patent 958 (finding No. 29, R 86), whereas VERONESI does not disclose a *pressure* system or all of the component elements of the combinations claimed in plaintiff's said patent;

4. In finding that the VERONESI (1927) patent *pictures* the system of Claim 12 of plaintiff's patent 285 (Decision, R 73), whereas its contrary finding (Decision, R 71) held that the VERONESI drawing should not in and of itself be considered a complete anticipation of plaintiff's system;

5. In finding that the VERONESI (1927) patent clearly discloses on its face the obvious presence of a low pressure discharge opening communicating with

the first stage of the pump (finding No. 15, R 81), whereas, the VERONESI drawing (R 559) pictures no such passage at all, and the specification teaches a different source of communication (Translation, R 606, lines 1 to 8 and 20 to 26);

6. In finding with respect to the VERONESI (1927) patent drawing that the flow arrow is shown as drawn from the impeller chamber to the discharge opening (R 70), whereas such finding is based upon the erroneous assumption that the dot-dash line is a part of the arrow instead of a conventional and well-recognized symbol for representing a center-line or line of symmetry;

7. In failing to construe Claim 11 of plaintiff's patent 285 in accordance with the specification of the patent in which it originated, and in concluding that such claim relates to a system in which two pumps are employed (Decision, R 72);

8. In finding that the SCHMID British patent was apparently never considered by the Patent Office in relation to Claim 11 of patent 285 (Decision, R 72), whereas the record shows it was so considered;

9. In finding that Claim 11 of patent 285 has not been infringed by defendants' accused systems (finding No. 49, R 92), whereas the record shows that the claim was drafted by defendants to cover their accused systems;

10. In finding that the systems claimed in each and all of the claims of each of plaintiff's patents 285 and 958 would be *duplicated* without invention, merely by

connecting an injector to one of the high-pressure discharge centrifugal pumps of the prior art patents to ENSSLIN, RATEAU, SULZER and STEPANOFF (findings Nos. 27 and 28, R 86), (No. 37, R 88) and (No. 46, R 91), whereas there is no evidence in the record to support such a hypothetical assembly, nor would such an assembly duplicate any of the systems of plaintiff's patents, and further, the District Court, by separate findings, has found such pump units unsuited for use with injectors (Decision, R 58);

11. In failing to accord to plaintiff's patents the presumption of validity and favorable intendments of interpretation to which they are entitled under the law, and in resolving every reasonable doubt against such patents and in favor of the prior art;

12. In failing to find each and all of the claims of plaintiff's patents 285 and 958 valid;

13. In finding that the system combinations of either of plaintiff's patents are anticipated by the prior art;

14. In finding that the system combinations of either of plaintiff's patents lack invention over the prior art.

IV.

SUMMARY OF ARGUMENT.

The destruction of plaintiff's patents is based solely on prior art either previously considered by the experts of the Patent Office and discarded, or which is

of no greater weight than that which was so considered.

The most heavily relied on art was the VERONESI (1927) Italian patent which disclosed in its drawing an *admittedly* obscure showing of a pump unit which is subject to at least two possible constructions, but only that contended for by plaintiff is supported by the specification of the patent. The Patent Office had this Italian patent under consideration during the prosecution of the applications of plaintiff's patents and, when made aware of the teachings in the specification of such Italian patent, recognized its irrelevancy and discarded it thereafter from consideration as a reference.

The District Court, in accepting defendants' version of the VERONESI patent disclosure, committed obvious errors in misinterpreting conventional drafting symbols on the VERONESI drawing and in misconstruing the clear teachings of the specification.

The District Court recognized the deficiency in the VERONESI patent drawing and sought to supply its lack of disclosure by reliance upon another foreign patent to SCHMID, which, like the VERONESI patent, had likewise been thoroughly considered by the experts of the Patent Office and also been found wanting.

Claim 11 of plaintiff's patent 285 was found to be invalid over the aforesaid SCHMID patent on the mistaken belief that this patent was apparently never considered by the experts of the Patent Office pre-

paratory to the allowance of this claim; but the record shows that the SCHMID patent was before the Patent Office at least three different times where Claim 11 was involved, and the claim was allowed with full knowledge of such patent and what it teaches or fails to teach.

In finding Claim 11 of patent 285 not infringed, the District Court overlooked the fact that this claim originated in defendants' own RHODA patent and was drafted to cover defendants' accused systems.

In finding both patents 285 and 958 invalid on the theory that the mere connection of an injector assembly to a high pressure stage of the ENSSLIN, RATEAU, SULZER or STEPANOFF pump units would duplicate the systems of plaintiff's patents, the District Court predicated its findings on arbitrary assumptions unsupported by evidence as to where or how to effect such connection, or whether the resulting combination will constitute a system, still less one that will function to pump water, and in so doing, arrived at findings which are hopelessly inconsistent and irreconcilable among themselves, as well as being inconsistent and irreconcilable with certain previous findings which, in the Court's own words, establish such pump units to be unsuited for operation with an injector.

Considering all the prior art patents relied on by defendants, it is significant that not one embodies teachings of any of the three system combinations of the patents in suit. And this finds support in the findings of the Patent Office.

The presumption of validity which attends plaintiff's patents was not mentioned in the Memorandum Decision of the District Court and apparently not accorded its proper weight in the conclusions reached. Far from being overcome by the obviously deficient prior art relied on by defendants, the ordinary presumption of validity has been strengthened to a degree bordering on finality by the following circumstances:

(1) Prior consideration by the experts of the Patent Office, of the best prior art relied on by defendants;

(2) The survival of plaintiff's patent 285 in an adversary interference proceeding in the Patent Office with defendants' RHODA patent;

(3) The high tribute accorded by defendants to plaintiff's inventions, as evidenced by:

(a) Their conduct in promptly adopting the same and incorporating said inventions in their new line of water systems;

(b) Their trade bulletins highly praising the inventive features of said systems and referring to them as unique; and

(c) Their claim of authorship of the inventions and the filing of a patent application on such systems.

V.

ARGUMENT.

CONFLICTING FINDINGS BETWEEN THE DISTRICT COURT AND THE PATENT OFFICE OF THE SAME PRIOR ART WARRANTS DE NOVO CONSIDERATION THEREOF.

A novel situation is created by this appeal since there exist, in effect, two conflicting opinions, one by the Patent Office and the other by the District Court. This situation is created since the most pertinent prior art presented to the District Court had already been considered by the Patent Office and an opposite conclusion reached.

Of the 11 prior art patents relied on by the defendants at the trial, 7 had already been considered and rejected by the Patent Office, and those not cited in the prosecution of the applications of plaintiff's patents were presumptively considered, since they add nothing to the art cited, being mere duplication of those features found in the art which it did cite.

Under such circumstances, *de novo* consideration of the prior art patents is well within the province of this Court, and in view of 35 U.S.C., Section 31, the interpretation of such art is as open to this Court as to the District Court or the Patent Office. In this connection it was said in the case of *Charles Peckat Mfg. Co. v. Jacobs,* 178 Fed. (2d) 794, 802 (CCA 7, 1949):

> *"But the ultimate question of patentability is whether the device meets the requirement of the statute. 35 U.S.C.A. 31. Here we have a finding of fact of anticipation because of existing prior art patents. Each of these documents was before*

the trial court and is before us. Their interpretation, in view of the statute, is as open to us as to the District Court. True, there was some parol testimony in the court below, but we find that it did not in any way throw light upon the question of anticipation by the prior art. Consequently we feel free to review the evidence bearing upon anticipation by the prior patents."

See also:

Sales Affiliates, Inc. v. National Minerals Co., 172 Fed. (2d) 608, 613 (CCA 7, 1949)

Consideration of the prior art patents, as hereinafter pointed out, will show that the findings of the lower Court as to anticipation of the patents in suit are clearly erroneous.

It is fundamental that in order to void a patent for anticipation, the prior patent or publication must give in substance the same knowledge and same directions as that of the patents in suit. Nor may the subtle influence of after-acquired knowledge, which subconsciously substitutes inferences for disclosure to explain an otherwise uninforming publication, be used to negative meritorious inventions.

". . . Inferences as distinguished from disclosures, especially when drawn in the light of after events, cannot be accepted as a basis of anticipation.

"A patent relied upon as an anticipation must itself speak. Its specification must give in substance the same knowledge and the same directions as the specification of the patent in suit."

Skelly Oil Co. v. Universal Oil Products Co., 31 Fed. (2d) 427, 431 (CCA 3, 1929)

See also:

1 *Walker on Patents* (Deller's Edition), pages 270-272, and cases therein cited.

The oral testimony offered by defendants in their efforts to negative invention in view of the prior art is of little worth, for at best it merely constitutes an attempt to make the asserted anticipatory art mean what it does not say and, by inferences drawn in the light of *ex post facto* wisdom, tends to create a doubt as to the novelty of the inventions involved.

Throughout the findings and conclusions of the District Court, as we will demonstrate, there exists a failure to accord to plaintiff's patents the well-recognized presumption of validity and favorable intendments of interpretation to that end which the law affords. On the contrary, the District Court resolved every reasonable doubt against the patents and in favor of the prior art.

We will now direct our attention, first, to the principal patent relied on by defendants to negative invention of the two patents in suit.

VI.

THE 1927 ITALIAN PATENT NO. 260,417 TO VERONESI FAILS TO TEACH THE INVENTIONS OF THE PATENTS IN SUIT.

This Italian patent of 1927 constitutes the principal reference relied on by defendants in their attempt to negative invention of the two patents in suit. In view of the extent of the controversy waged in the District

Court around the *interpretation* of this foreign patent, it becomes necessary to point out in some detail its complete failure as a reference although the extent and nature of the controversy is in itself cogent evidence of this fact.

It is significant that this foreign patent was fully considered and found wanting by the experts of the Patent Office, first, in the normal prosecution of patent 285, and again after it had been strongly urged by defendants to negative invention in the interference (Dft. Exh. D), between their own RHODA Patent No. 2,315,656 (R 536) and the application of patent 285.

The granting of patent 285, therefore, involved an adversary proceeding between plaintiff and defendants in the interference proceeding, and its normal prosecution, in a broad sense, was impliedly an adversary proceeding wherein the Patent Office was aligned against plaintiff to protect the public against unwarranted monopoly. Under these circumstances the presumption of validity is strengthened to an extent bordering on finality with respect to this foreign patent. The effect of granting a patent under such circumstances is aptly summarized in the case of *Williams Mfg. Co. v. United Shoe Mach. Corp.,* 121 Fed. (2d) 273 (CCA 10, 1941) (aff'd 316 U.S. 364; 86 L. Ed. 1537), wherein the Court said at page 277:

> "To the presumption of validity that attaches to a granted patent, where the most pertinent prior art has been cited against it in the patent office, there must probably now be added the force of a growing *recognition of finality* that is generally

being accorded to administrative determinations supported by evidence, on the ground that the administrative agency is expected to have developed an expertness in its specific field beyond what may be expected from the courts wherein adjudications range the whole field of human controversies. *It is true, of course,* that in the most strict sense, the granting of a patent is not, except *when an interference is declared,* the result of an adversary proceeding, as in usual administrative determinations of agencies exercising quasi-judicial functions. Nevertheless, it wears, in the broader sense, an adversary aspect, since patent office examination protects the public against unmerited monopoly, and so the public, as represented by the examiner, is always impliedly in adversary position to the application just as it is ever a third party to an infringement suit."

The teachings of the VERONESI Patent No. 260,417 fall far short of that required to anticipate plaintiff's meritorious inventions.

A foreign patent is to be measured as anticipatory by what it clearly discloses and not by what might have been made out of it.

> "A foreign patent is to be measured as anticipatory, not by what may be made out of it, but by what is clearly and definitely disclosed by it."
>
> *Steiner Sales Co. v. Schwartz Sales Co.,* 98 Fed. (2d) 999, 1003 (CCA 10, 1938)

This foreign reference discloses an injector type system employing a horizontally disposed multi-stage

centrifugal pump having but *one* discharge to service. The drawing, in and of itself, is *admittedly* obscure, in that it fails to picture an open passage from any specific location in the pump unit for the flow of water to the service discharge.

Plaintiff contends that the water for service comes from the last stage of the pump unit from which the ejector is also supplied. This has become conventional practice in the art as shown by defendants' CARPENTER system (Dft. Exh. J, R 544) and plaintiff's F. JACUZZI patent (R 584). Plaintiff bases its interpretation of the VERONESI patent drawing on the VERONESI patent specification which clearly and unmistakingly confirms plaintiff's contention, as follows:

> "Ejector 1 is not operated by a special pump, but operates with any suitable type pump. Water issuing from *the* exhaust of the pump is divided into approximately equal portions; one portion is directed to the place of utilization; the other is injected to the bottom of the well by means of pipe 2 and serves to actuate ejector 1. . . . In the pump the pressure of liquid is raised to the desired limit, and the liquid is then divided as mentioned hereinabove into two parts, one of which is directed into the aforementioned line 2 downward, while the other goes upward into the aforementioned line 9." (R 606)

Defendants, on the other hand, interpret the VERONESI drawing as indicating the water for service coming from the first stage of the pump unit, with the

injector being fed from the last stage. Such interpretation, however, imparts to the VERONESI structure two exhausts, with the water of necessity being divided at some point between the first and second stages. Inasmuch as the VERONESI *specification* speaks of "the" exhaust, thus limiting the pump to one having but one exhaust, and inasmuch as the division of water is clearly stated as occurring *at* the exhaust, defendants' interpretation finds no support in the specification; and in this connection it is significant that defendants' counsel, in examining his own witnesses on the interpretation of the VERONESI drawing, studiously avoided the VERONESI specification.

Further, in the *latter* part of the above quotation, which is directed to the *specific pump illustrated* by VERONESI, the patentee speaks first of that portion of the water which goes down to the ejector, and then mentions the portion which goes up to the service discharge, thus making it impossible to sustain defendants' erroneous views that the water is divided before it reaches the last stage or exhaust, or that the portion referred to last by VERONESI is taken off first and from an early stage of the pump unit.

Under the circumstances, the specification is controlling, and such is the recognized law as held by this Court in the case of *Carson Inv. Co. v. Anaconda Copper Mining Co.,* 26 Fed. (2d) 651, at Page 658:

> ". . . there cannot be substantial variance between the drawings of a patent and the specification. Where there is conflict, as a rule, the specification must govern."

Again this Court stated in the case of *Carson v. American Smelting & Refining Co.*, 4 Fed. (2d) 463, at Page 465:

> "A foreign patent is to be measured as anticipatory, not by what might have been made out of it, but by what is clearly and definitely expressed in it. An American patent is not anticipated by a prior foreign patent, unless the latter exhibits the invention in such full, clear, and exact terms as to enable any person skilled in the art to practice it without the necessity of making experiments." (Citing cases).

The experts of the Patent Office during the prosecution of plaintiff's patent 285, when confronted with a similar translation of the above noted pertinent paragraph from the VERONESI patent, recognized the same as controlling in the matter of the meaning of the VERONESI drawing, and thereafter discarded this Italian patent as a reference, even in the face of defendants' voluminous arguments on this same point during the interference proceedings involving the application of plaintiff's patent 285 and defendants' RHODA patent (R 536).

In spite of the prior consideration of the VERONESI patent by the Patent Office, the District Court, in its memorandum decision, upon what turns out to be an erroneous premise, found what it termed a "flaw" in the argument to the Patent Office, namely that the invention of VERONESI was not directed to the pump at all but that the invention claimed was the injector (R 70). Just what this has to do with the

clearly expressed teachings of the VERONESI specification is not apparent, for plaintiff is not attempting to interpret or distort the language of this foreign patent but is relying on the plain meaning and intent of the wording used. To merely look at and read this patent is to recognize that the patent relates to a *system* wherein the *pump* is as vital a component as the *injector*. Thus in the specification, we find:

> "The present invention consists, therefore, in a *combination* constituted of one of several hydraulic ejectors, of two pipes which join the ejector, or the ejectors, to the pump (separated or concentric, depending on whether used for uncased or cased wells) and of a single pump which actuates the ejector or the ejectors, and creates the desired pressure." (R 607)

And as to the claims of the VERONESI patent, it will be noted that they also define the invention as a system combination in which the pump is a vital element. Thus Claim 1 provides:

> "A hydraulic ejector device for pumping liquid from great depth characterized in that one single pump of any type or system serves both to create pressure toward the ground for operating the ejector and to lift the required quantity of liquid." (R 607-608)

It is significant that neither the defendants nor the District Court made any attempt to reconcile the VERONESI specification with defendants' interpretation of the VERONESI drawing. The burden of proof, therefore, to such end has not been sustained by defendants.

Despite the admitted absence of any showing of a passage from the first stage direct to the service discharge 9 in VERONESI, the District Court purports to supply such deficiency to support its interpretation of this patent, by a finding that "the only reasonable purpose of the flow arrow drawn from the impeller chamber to the opening would be to indicate that the passage is there." (R 70)

Here again the District Court's conclusion is based upon a mistaken premise, namely that the dot-dash line is part of the arrow. A dot-dash line, however, represents a center line or a line of symmetry and, in this instance, it designates the symmetrical section of flange 9. The arrow, on the other hand, designates the direction of flow or, in other words, in what direction the water is going and not the place from whence it came; thus all that can be deduced from the arrow is that at the point it appears, ie. at the discharge end of flange 9, the flow of water is in an upward direction.

Should this Court, upon consideration of this VERONESI patent, feel that the finding of the District Court as to the meaning of the language employed by the patentee is equally plausible to that of both the Patent Office and plaintiff, then the patent is still too vague to constitute an anticipatory reference. In this connection, it was stated in *Atlantic, Gulf & Pacific Co. v. Wood,* 288 Fed. 148, 155 (CCA 5, 1923):

> "We agree with the Court below that the Thomson patent so lacks that definite description of what is intended by such alternative form of the Thomson vane that it does not charge the

plaintiff with that knowledge, actual or constructive, which makes it an anticipation.

'A document (patent) so obscure in its terminology that two conflicting theories may be deduced therefrom and supported by equally plausible arguments is too indefinite to be utilized as an anticipation. Cimiotti Unhairing Co. v. Comstock Unhairing Co., (CC) 115 F. 524.' "

See also:

Lever Bros. Co. v. Procter & Gamble Mfg. Co., 139 Fed. (2d) 633, 640, 641 (CCA 4, 1943).

On the basis of its erroneous understanding as to what the VERONESI patent teaches, the District Court found first as to patent 958:

"The system described is *the precise system pictured* in the Italian patent No. 260,417 to Hugo Veronesi" (R 69)

and with respect to Claim 12 of patent 285:

"It is also pictured in the Veronesi drawing" (R 73)

but such findings are inconsistent with other findings of the Court and point the error of its conclusions. In this connection the Court found:

"Considering plaintiff's systems as a whole, it is apparent that they are both useful and novel. *No prior systems are substantially identical* with plaintiff's systems." (R 68)

Further error and uncertainty on the part of the District Court as to the teachings of this VERONESI

patent are evident from the following conclusion of the Court:

> "However, *since the invention claimed in this patent was the injector,* there is *nothing* in the patent to indicate the significance of a discharge passage from an early impeller stage of the pump unit and the isolation of the injector at the last impeller stage. *For this reason, perhaps, the drawing should not in itself be considered a complete anticipation of plaintiff's system.* But this drawing when considered in connection with such other prior art as the system described in the Schmid patent clearly points the way to such a system as claimed in plaintiff's patent No. 2,344,-958." (R 71)

for it not only repeats a previous error as to what VERONESI claims as his invention, but now also clearly expresses doubt as to the clarity and sufficiency of the VERONESI disclosure to constitute a complete anticipation of the system of plaintiff's patent 958.

> "The patent law requires certainty of expression and not merely conjectural allusion or ambiguous reference to the subject matter, before a prior patent can overcome the validity of a later one that has meritoriously progressed the art."
>
> *A. B. Dick Co. v. Underwood Typewriter Co.,* 246 Fed. 309, 312 (Aff. CCA 2nd, 252 Fed. 990).

The confusion and misconception of the District Court as to the invention claimed by VERONESI, the admitted failure of the patent to teach the significance

of a low pressure discharge, coupled with the ambiguity of the drawing, all serve to destroy the District Court's conclusion that such drawing, when considered with such prior art as the SCHMID British Patent No. 382,592 (R 595), clearly points the way to such a system as claimed in plaintiff's patent 958. This is particularly true since the same SCHMID patent, which discloses a system employing two separate pump units with an intervening tank or reservoir (not a pressure tank as the Court assumed), and no foot valve, was thoroughly considered by the experts of the Patent Office during the prosecution of the application of plaintiff's patent 285 and discarded as irrelevant, and was presumptively considered in connection with the prosecution of the application of plaintiff's patent 958, such presumption being strengthened by the fact that the second application was a continuation-in-part of the first, was co-pending therewith, and was handled by the same Examiner who determined the line of division for plaintiff to maintain between them.

The foregoing has served to point up the errors of the District Court in connection with its consideration of the VERONESI patent, but ignoring these and even *surmising* what the drawing does *not* show, i.e. an open passage to service from the first stage of the pump unit, the VERONESI patent still remains an incomplete disclosure of the invention as measured by the claims of plaintiff's patent 958 and falls far short of supporting the findings of the District Court that the system described in such claims is the *precise* sys-

tem *clearly disclosed* in the VERONESI patent (Finding No. 29, R 86) or is the *precise* system *pictured* in the drawings of such patent (Decision, R 69, lines 5-8).

If the invention defined by the claims is the *precise* system disclosed or pictured in the VERONESI patent, then there must be found in this patent all the elements of the combinations claimed in plaintiff's patents.

One of such elements appearing in all the claims as an essential component of the combinations is the discharge passage or connection leading from a specified stage of the pump to an element of the system such as a pressure tank or spigot. To begin with, therefore, VERONESI fails to either picture or otherwise disclose such a connection and under the circumstances could not possibly disclose the precise system of the claimed invention even if nothing further were involved. Some of the claims, however, go further in reciting the connection or passage leading to a pressure tank or chamber, thus limiting the invention of those claims to a *pressure* system which is not to be found in the VERONESI patent. In addition, the majority of the claims recite that the connection or passage is valve free or free of any control valve, and those claims not specifically so reciting include the pressure tank as a component and necessary element of the claimed combination and its specific location in the claims permits of a valve free connection between the pressure tank and pump unit.

With no discharge connection at all disclosed in the VERONESI patent, how can it be surmised that, even if there, it would be free of any control valve? Merely connecting a discharge line to the flange 9 of the VERONESI pump is not enough, for then, by surmise and conjecture, such line would have to be connected in the relationship called for by the claims to *another* component element of the system, and it be further surmised that such connection was *valve free.*

It is not enough for a patent relied on as an anticipation of a combination to *suggest the possibility* of the presence of features to anticipate a later patent. It is not enough to show by surmise and conjecture how a prior patent might, by modification, be made to operate in accordance with the patent attacked. This certainly falls far short of satisfying the strict requirement of the law as to what constitutes anticipation.

> "No doctrine of the patent law is better established than that a prior patent or other publication to be an anticipation must bear *within its four corners* adequate directions for the practice of the patent invalidated. If the earlier disclosure offers no more than a starting point for further experiments, if its teaching will sometimes succeed and sometimes fail, *if it does not inform the art without more how to practice the new invention,* it has not correspondingly enriched the store of common knowledge, and it is not an anticipation."
>
> *Dewey & Almy Chemical Co. v. Mimex Co.,* 124 Fed. (2d) 986, 989 (CCA 2, 1942).

"A foreign patent is to be measured as anticipatory, *not by what may be made out of it, but by what is clearly and definitely expressed in it.*"

Carson v. American Smelting & Refining Co., 4 Fed. (2d) 463, 465.

"Devices and publications leading up to, but not fully accomplishing, a desired end, do not anticipate an invention which for the first time effectively meets all requirements and successfully accomplishes such end."

In re Cole, 46 Fed. (2d) 575, 577 (CCPA 1931).

". . . Therefore in order to negative novelty or, as it is usually expressed, to 'anticipate' an invention, it is necessary that all of the elements of the invention or their equivalents be found in one single description or structure where they do substantially the same work in substantially the same way." (Citing numerous cases.)

Walker on Patents, Deller's Edition, Vol. 1, Sec. 48, Page 255.

"In order to constitute anticipation of a combination claim, it is necessary that all the elements of the combination, or their mechanical equivalents, should be found in a single patent or description, where they do substantially the same work by substantially the same means. Rhodes v. Lincoln Press-Drill Company (C.C.) 64 F. 218."

Chicago Lock Co. v. Tratsch, 72 Fed. (2d) 482, 487 (CCA 7, 1934).

Anticipation must be tested by foresight not hindsight, and a modification of the VERONESI drawing

and the supplementation thereof made after knowledge of plaintiff's systems to show how his system might be made to work like plaintiff's systems or how elements could be added to create a *pressure* system such as called for in many of the claims of patent 958, does not carry weight as showing anticipation.

"To be effective as an anticipation the printed or public disclosure of the subject of the patent must be in such terms as to enable a person skilled in the art of the science to which it pertains, to make, construct, and practice the invention *without assistance from the patent which it is said to have anticipated.*"

Midland Flour Milling Co. v. Bobbitt, 70 Fed. (2d) 416, 418 (CCA 8, 1934).

"Many things, and the patent law abounds in illustrations, seem obvious after they have been done, and, 'in the light of the accomplished result,' it is often a matter of wonder how they so long 'eluded the search of the discoverer and set at defiance the speculations of inventive genius' . . . *Knowledge after the event is always easy,* and problems once solved present no difficulties, indeed, may be represented as never having had any, and expert witnesses may be brought forward to show that the new thing which seemed to have eluded the search of the world was always ready at hand and easy to be seen by a merely skillful attention. But the law has other tests of the invention than subtle conjecture of what might have been seen and yet was not."

Diamond Rubber Co. of New York v. Consolidated Rubber Tire Co., 220 U.S. 428; 55 L. Ed. 527, 531-532.

VII.

CLAIM 11 OF PATENT 285 WAS DRAFTED BY DEFENDANTS TO COVER THEIR OWN SYSTEMS, AND ITS INFRINGEMENT IS THEREBY ADMITTED, AND ITS VALIDITY OVER THE BRITISH PATENT TO SCHMID HAS BEEN SUSTAINED BY THE PATENT OFFICE.

The origin of Claim 11 of plaintiff's patent 285 and the application of its terminology to the accused systems of defendants is important in considering the fundamental error of the District Court's findings of anticipation and non-infringement of such claim.

In this connection, such claim was taken *verbatim* from defendants' RHODA patent No. 2,315,656 (R 536) wherein, by coincidence, it appears under the same claim number. *The language of the claim is that chosen and adopted by defendants* as the employer and assignee of the party RHODA *to cover,* in the RHODA application and by patent, *the very systems which they now contend do not infringe such claim.*

The prosecution of the RHODA application and the securing of the patent thereon are strong evidence of what the defendants thought of the invention covered by Claim 11 before the question of priority of inventorship arose between their employee RHODA and the applicants of plaintiff's patent, and is certainly presumptive of what the District Court should have thought on the matter of infringement.

In the interference between the defendants' patentee RHODA and the applicants of plaintiff's patent 285, plaintiff had no alternative but to adopt the language of the RHODA claim. The language of Claim

11, therefore, is that of the RHODA patent, and while somewhat inept in defining a system in terms of a "low pressure pump" and a "high pressure pump", such terms must be construed and interpreted in accordance with the RHODA patent disclosure.

> "While it is true that, generally, a claim should be construed as broadly as its terminology will reasonably permit, it is also true that one copying a claim from a patent must, where the terms of the claim are ambiguous, be bound by the meaning intended by the patentee as shown by his disclosure. In re Nicolson, 49 F. 2d 961, 18 C.C.P.A., Patents, 1468."
>
> *In re Babcock,* 110 Fed. (2d) 665, 667 (CCPA 1940).

Reference to the RHODA specification as well as to that of plaintiff's patent 285 shows that in both cases the invention was directed to an injector type system involving a *single* pump unit constructed of a plurality of superimposed impeller stages within a common casing and that the terms "high pressure pump" and "low pressure pump" relate to certain *stages* of the single pump unit disclosed in such patents.

To construe Claim 11 in the light of the specification is to merely follow the law as laid down in this Circuit.

> "The claim is to be read in connection with the specifications. (Citing cases) Where the claim uses broader language than the specifications,

reference may be had to the latter for the purpose of limiting the claim. (Citing cases)."

Schnitzer v. California Corrugated Culvert Co., 140 Fed. (2d) 275, 276 (CCA 9, 1944).

See also:

Payne v. Williams-Wallace, 117 Fed. (2d) 823 (CCA 9, 1941).

On the mistaken theory that Claim 11 calls for two separate and independent pumps, the District Court found the claim fully anticipated by the British patent to SCHMID, No. 382,592 (Dft. Exh. V, R 595), and in this connection found:

"This patent was cited as a reference by the Patent Examiner. But the file wrapper shows that Claim 11 was not in the original application but was added later as a prelude to an interference proceeding and thus the Schmid patent was *apparently* never considered in relation to this claim." (R 72)

Such consideration of patentability by the Examiner at the time would seem to be wholly immaterial since the patentability of Claim 11 had already been passed upon by the Examiner in the prosecution of the RHODA application as evidenced by the allowance of said claim in the resulting RHODA patent. In this connection the District Court apparently overlooked the fact that the British patent had been made of record and was before the Examiner in the RHODA application when Claim 11 was allowed to him.

Of further significance to this issue is the fact that the SCHMID patent was very strongly urged against Claim 11 by the defendants in the aforementioned interference. We thus have a situation where, contrary to the conclusion of the District Court, the SCHMID patent was *thrice* considered by the Patent Office, once in the RHODA application, again in the application of the patent in suit, and still again as a result of said interference.

The repeated reference to and consideration of this British patent by the Patent Office, therefore, approaches a finality of decision which should be upheld by this Court.

VIII.

THE EVIDENCE FAILS TO ESTABLISH THAT PLAINTIFF'S PATENTS ARE VOID FOR WANT OF INVENTION.

A. The conflicting and irreconcilable findings of the District Court clearly establish the failure of the prior art to teach the three system combinations of the patents in suit and evidence the failure of defendants to sustain the heavy burden of proof required by law.

At the trial, defendants relied on the pump units disclosed in the prior art patents to ENSSLIN (R 575), RATEAU (R 564), SULZER (R 561) and STEPANOFF (R 569) in an effort to establish that the method of dividing water, which they employed in their own pump units, inherently existed in these prior art pump units and was, therefore, old. Defendants did not contend, nor did they offer any testimony, attempting to show that the pump units of

these prior art patents could be modified or supplemented with other components to obtain all or any one of the three system combinations A, B and C of plaintiff's patents. None of these prior art patents was concerned with deep well pumping nor with injectors, nor is there any suggestion in any of these patents, which contemplated the attachment of an injector to the pump units, or of any teaching of plaintiff's new system combinations, which systems the District Court found to be "both novel and useful" (R 68).

How then can the District Court, in the absence of any such proofs by defendants, or of any teachings in the prior art patents, conclude as it did in essentially identical findings, Nos. 27 and 28 (R 86), No. 37 (R 88) and No. 46 (R 91), that the pumping systems of plaintiff's patents could be *duplicated* without invention merely by connecting an injector to one of the high pressure connections of the multi-discharge centrifugal pumps of any one of these prior art patents. The prior art cited above and the record show that, prior to plaintiff's systems, multi-pressure centrifugal pump units had been in use at least 39 years, and injectors, at least 29 years, but not together. If plaintiff's systems could be duplicated as simply as the District Court seems to think, why did defendants have to wait until plaintiff showed how such systems could be effected?

On what basis can the District Court support its creation of a hypothetical arrangement which had never previously existed in the prior art and thereby

conclude that plaintiff's systems were old? In the absence of evidence to that effect, how can the District Court conclude at what stage of the pump unit of these prior art patents to connect the injector, or that, if made at the last stage, such hypothetical system would possess the stability of plaintiff's systems and be capable of maintaining operation irrespective of fluctuations in the level of water in the well?

The District Court itself throws doubt upon the hypothetical system so created by it, for apparently, without appreciating the significance thereof, it made certain findings which, when considered together, negative its conclusions as to how plaintiff's new systems could be duplicated. Thus, in speaking of these early multi-pressure discharge centrifugal pumps, and the probable use thereof with injectors, the District Court found:

> "The centrifugal pump itself operates in the same manner with or without an injector assembly attached. But *special* difficulties are presented in supplying a multi-pressure discharge from a centrifugal pump with an injector assembly attached. The injector assembly requires a certain minimum *volume* and *pressure* of water for continued operation. Therefore, if too much of the water is permitted to flow from a discharge opening tapping one of the early impeller stages of the pump unit, insufficient water will pass through the pump to supply the injector assembly. When there is no injector assembly in the system, if an excessive volume of water flows out the low pressure discharge, the result will be merely the starving of the high pressure dis-

charge for water. But with an injector assembly in the system, the result will be the stalling of the entire system." (R 60)

In again speaking of these same prior art pumps, the District Court found:

"Multi-pressure contrifugal pumps of the type just described are old in the art. But of the specific models brought to the Court's attention, *none were designed specifically to supply water at different pressures simultaneously.*" (R 58)

A pump unit, to supply service at one pressure and an injector at a higher pressure, must necessarily supply water at different pressures simultaneously. Consequently, when one attempts to connect an injector to any one of the aforesaid pumps, he will not only run headlong into those "special difficulties" which the District Court found existed, but one would also be faced with the added problem of obtaining simultaneous discharge at different pressures from pumps which the Court found were not suited for such operation.

If the system created by the District Court of its own volition is a *duplication* or counterpart of plaintiff's system combinations, then, of necessity, one would expect to find *all* of the component elements of the three claimed combinations therein, but where in the hypothetical system created by the District Court is there to be found a *pressure* system involving a pressure tank such as called for in certain of the

claims of patent 958, or the service connection specifically located, as called for by the majority of such claims, or the valve free passage through such connection? Where is the specific means within one of the stages for dividing the water between the low pressure discharge and a subsequent stage of the pump unit as called for in many of the subcombination claims of patent 285, and where is there the pressure tank called for in Claims 17 and 18 of such patent and the novel relationship of elements which provides for the automatic starting up of the system upon the mere opening of a spigot from the low pressure side of the system, and, furthermore, how can the attachment of an injector to these prior art pumps duplicate the pressure system of Claims 17 and 18 of patent 285 which does not even require an injector?

There further exist the inconsistent and irreconcilable findings of the District Court in connection with the holdings of invalidity of Claims 17 and 18 of patent 285. Whereas previously the District Court, in its finding No. 46 (R 91), held the system of these claims duplicated by the hypothetical connection of an injector to one of the aforementioned multi-pressure discharge centrifugal pumps, in another finding, No. 40 (R 89), the District Court considered the systems of these same claims duplicated, this time, not by the connection of an injector, but by the connection of a pressure tank and pressure switch in lieu of the injector. Such findings obviously cannot be reconciled and indicate fundamental error and confusion.

Further error exists in said finding No. 40, in that the District Court, in complete contradiction of plaintiff's patent 285, states:

> "Plaintiff seems to assume that by adding a pressure tank and switch to its multi-pressure centrifugal pump, it achieves a distinct invention." (R 89)

To merely read plaintiff's patent will make clear that what the patentees of said patent actually did was to create out of the conventional pressure system a new system which the District Court recognized as "both useful and novel" (R 68) and which new system, unlike any pressure system shown in the prior art, can deliver water at low pressure and large volume for irrigation purposes and also provide for automatic starting of the system from the end of the irrigation discharge.

The law does not look with favor upon the method adopted by the District Court, upon its own volition, to effect anticipation of plantiff's patents.

> "Anticipation cannot be made out of selecting part of one patent and part of another, and still a part of a third to build up a *hypothetical construction,* which may answer the combination of the claims of the patent (citing case)."
>
> *Line Material Co. v. Brady Electric Mfg. Co.,* 7 Fed. (2d) 48, 49 (CCA 2, 1925).

The District Court's finding No. 41 holding Claims 3, 9-14, 17 and 18 of patent 285 so broadly drawn as to virtually include every possible system in which a

multi-pressure discharge is supplied from a pump with an injector attached, is erroneous from more than one approach. The fundamental theory of claim drafting is to define or measure the advance over the prior art. The prior art, therefore, constitutes the base from which to measure the broadness of claims to which an inventor is entitled. The District Court relies on no prior art in its finding and, therefore, the finding becomes meaningless.

The District Court, furthermore, erred in its interpretation of the scope of said claims, for, in general, they obviously are not as broad as designated by the District Court. Claims 3 and 14 limit the system to one having a by-pass passage leading downwardly from a high pressure stage; Claims 9, 10 and 13 restrict the claimed system to one in which the pressure difference between the low pressure service discharge and the injector is such as to maintain operativeness of the injector assembly at the lowest normal level of water in the well; Claim 14 further restricts the claimed system to one having a control valve in a service line; while Claims 17 and 18 are restricted to a system requiring a pressure tank and automatic switch and are thus limited to a pressure system.

Findings No. 42 and No. 43 are erroneous for like reasons, with finding No. 43 being further obviously in error in stating as a premise that means for dividing water between a discharge outlet and an *injector* to assure an operating supply to the injector is old. No prior art or testimony exists to justify such state-

ment, and finding No. 12, to which the District Court refers, does not consider an injector and, therefore, does not support such conclusion. In fact, the District Court's finding that the multi-pressure pumps of record were not suitable for simultaneous discharge at different pressures would tend to nullify the aforementioned conclusion and confirm the existence of error therein.

In addition to the VERONESI, SCHMID, ENSSLIN, RATEAU, SULZER and STEPANOFF patents above discussed, defendants, at the trial, relied upon other prior art patents, namely, a second Italian VERONESI (1913) patent (R 545), a German patent to SPECK (R 591), and U.S. letters patent to R. JACUZZI (R 579) and to F. JACUZZI (R 584).

While the VERONESI patent of 1913 cannot be used for purposes of anticipation because not pleaded or otherwise noticed in advance of the trial as required by 35 U.S.C.A., Section 69, the District Court nevertheless considered it along with the German patent to SPECK to be unimportant (R 62-63); also the JACUZZI patent No. 1,758,400 was discarded in view of its inherent limitations (R 61, 62).

As to the F. JACUZZI patent No. 2,150,799, the District Court commented on the similarity of its internal stage structure to the structure relied on by plaintiff to secure proper division of water between its low pressure service discharge and the higher stages which feed the injector assembly, and found:

> "All plaintiff did was to adapt this system of ports and passages to a dual discharge pump by

reconstructing some of the passages to direct the water to the discharge opening rather than to the eye of the succeeding impeller." (R 74-75)

A glance at plaintiff's patent 285 will show that the F. JACUZZI patent was cited therein as a basis for describing one form of the inventions in issue. The system of ports and passages in the F. JACUZZI patent is present to convert velocity to pressure as the water travels between stages. Their function is not that of dividing water between components of the pump unit, for all the water proceeds to the succeeding stage. When plaintiff associates a service discharge from a low pressure stage having such system of ports and passages, they take on the additional function of dividing the water between service and the injector with assurance that the injector will be favored. Thus a new combination is born and this the Patent Office found after consideration of this reference.

The conflicting and irreconcilable findings of the District Court, in some cases based upon mistaken assumptions, as above pointed out, constitute cogent evidence of the failure of defendants to sustain the heavy burden of proving beyond a reasonable doubt that the prior art left no room for the inventions of plaintiff's claimed combinations.

B. Plaintiff's patents are for combinations.

Plaintiff's systems involve a plurality of elements so co-related and assembled as to provide new combinations which have achieved new, improved, useful

and beneficial results in meeting the water requirements of the average farmer. As previously pointed out, the record shows, not only from the testimony but from defendants' literature, that plaintiff's new combinations mean for the farmer, more water at less cost, saving 30% to 50% in power bills; greater efficiency in operation; economy of maintenance; continuous operation irrespective of change in operating conditions; automatic starting from the distal end of the irrigation line; the obviating of troublesome control valves; and simultaneous supplying of irrigation and household requirements from a single system. Hence the question of whether each of the elements of any combination is old is immaterial, for, whether old or new, it is the *combinations* which have achieved the new and improved accomplishments above pointed out.

> "A *combination* is a composition of elements, some of which may be old and others new, or all old or all new. It is, however, the combination that is the invention, and it is as much a unit in contemplation of law as a single or non-composite instrument."
>
> *Leeds & Catlin v. Victor Talking Mach.,* 213 U.S. 325, 332; 29 S. Ct. 503; 53 L. Ed. 816.

> "If it be conceded as appellant contends, that each element of the apparatus patent is old in the art, we think it cannot be denied that they are here used in such manner as to produce a new and useful result, in a more efficient, economical and facile way."
>
> *City of Milwaukee v. Activated Sludge,* 69 Fed. (2d) 577, 588 (CCA 2, 1934).

"A new combination of old elements, whereby a new and useful result is produced, or an old result is attained in a more facile, economical, and efficient way, may be protected by patent as securely as a new machine or composition of matter."

National Hollow v. Interchangeable, 106 Fed. 693, 706 (CCA 8, 1911).

"Walker made a very substantial improvement over Lehr & Wyatt. Notwithstanding, it is conceded that both his recorder and his amplifier, considered by themselves, are old in the art. We think the patentee displayed a measure of inventive genius entitling him to patent protection. He has combined features which *achieve a new result,* or at least an old result in a better way."

Halliburton Oil Well Cementing Co. v. Walker, 146 Fed. (2d) 817, 819 (CCA 9, 1944) Aff'd 326 U.S. 696.

"It may be laid down as a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produce a new and beneficial result, never attained before, it is evidence of invention. It was certainly a new and useful result to make a loom produce fifty yards a day when it never before had produced over forty; and we think that the combination of elements by which this was effected, even though those elements were separately known before, was invention sufficient to form the basis of a patent."

Webster Loom Co. v. Higgins, 105 U.S. 580, 592 (1881), 26 L. Ed. 1177.

C. Invention is not to be negatived by ex post facto wisdom.

The time-worn defense of non-invention and belittlement of plaintiff's accomplishment as urged by the defendants is based upon hindsight and not foresight. With eyes sharpened by the disclosure of the patents in suit and guided and directed thereby, defendants, as well as the District Court as evidenced in its finding No. 40 (R. 89), attempt to relegate the discoveries to the status of ordinary developments of the artisan or mechanic skilled in the art.

It is fundamental in considering whether the difference between the systems of the patents in suit and those of the prior art are the result of mechanical skill or involve inventive ingenuity, that care be taken to divest the mind of the ideas added to the art by the patents in suit. It cannot be too strongly emphasized that after-acquired knowledge is a subtle and subconscious agent which may readily mislead, and that obviousness after the fact is no evidence of the lack of invention, for as the Supreme Court has aptly stated in *United States v. American Bell Telephone Co.,* 167 U.S. 224; 42 L. Ed. 144, at Page 161:

> ". . . wisdom born after the event is the cheapest of all wisdom. Anyone could have discovered America after 1492."

D. The presumption of validity of plaintiff's patents.

It is the established rule, well recognized in this Circuit, that letters patent are *prima facie valid* and that the party asserting the contrary has the burden of establishing invalidity by evidence which carries conviction *beyond a reasonable doubt.*

"At the outset, it should be observed, that 'the grant of letters patent is prima facie evidence that the patentee is the first inventor of the device described in the letters patent, and of its novelty.' (Citing cases).

"Before a patent can be declared invalid because of anticipation, its lack of novelty must be established beyond a reasonable doubt. (Citing cases)"

Bianchi v. Barili, 168 Fed. (2d) 793, 795 (CCA 9, 1948).

See also:

Walker on Patents, Deller's Edition, Vol. 1, Pages 300-302.

E. The presumption of validity is strengthened by virtue of the Patent Office having considered most pertinent prior art.

Particularly heavy is the infringer's burden of establishing invalidity of the patents attacked, where, as here, the best art that could be produced had been considered and found wanting by the Patent Office during the consideration of the claims in suit. Thus the prior art patents to VERONESI (Italian) (1927) (R 552); SCHMID (British) (R 595); R. JACUZZI (R 579); F. JACUZZI (R 584); ENSSLIN (R 575) and HILLIARD (R 618) were all considered by the Patent Office as failing to negative invention in the claimed combinations of plaintiff's patents.

While defendants produced other prior art patents, the same were either less pertinent to negative invention or, at the best, of no better value than those considered by the Patent Office. Thus the patents to

SPECK (German) (R 591) and VERONESI (Italian) (1913) (R 545) were found unimportant by the District Court, and the patents to SULZER (R 561), RATEAU (R 564) and STEPANOFF (R 569) are no better references than, and are merely cumulative of the disclosures of, the patents to ENSSLIN and HILLIARD which the Patent Office had considered.

"In 3 Walker § 700, page 2010 it is said: 'The presumption of validity is strengthened by the circumstance that the alleged anticipating patent was considered by the Patent Office in connection with the application for the patent in suit.' "

Bianchi v. Barili, supra.

". . . To the presumption of validity that attaches to a granted patent, where the most pertinent prior art has been cited against it in the patent office, there must probably now be added the force of a growing recognition of finality that is generally being accorded to administrative determinations supported by evidence, on the ground that the administrative agency is expected to have developed an expertness in its specific field beyond what may be expected from the courts wherein adjudications range the whole field of human controversies . . ."

Williams Mfg. Co. v. United Shoe Mach. Corporation, 121 Fed. (2d) 273, 277 (CCA 6, 1941), (Aff'd) 316 U.S. 364; 86 L. Ed. 1537.

"Having concluded that defendants' mounting infringes, it is now necessary to determine whether the Morley patent is valid and of course

there is a presumption of validity not only raised by the granting of the patent (Radio Corp. v. Radio Laboratories, 293 U.S. 1, 7 (21 USPQ 353, 355) (1934); Johns-Manville Corporation v. Ludowici-Celadon Co., 117 F. 2d 199 (48 USPQ 180) (1941); Gebhard, et al. v. General Motors Sales Corporation, et al., 135 F. 2d 248 (57 USPQ 166) (1943); Ralph N. Brodie Co. v. Hydraulic Press Mfg. Co., 151 F. 2d 91 (66 USPQ 396) (1945) *but the fact that defendant copies the device disclosed and claimed in plaintiffs' patent is very strong evidence that it is substantially different from devices of the prior art.* Diamond Rubber Co. v. Consol. Tire Co., 220 U.S. 428, 440, 441.

"To the same effect see Farmers' Handy Wagon Co. v. Beaver Silo & Box Mfg. Co., 236 F. 731, 738; A. R. Milner Seating Co. v. Yesbera, 133 F. 916; Steiner Sales Co. v. Schwartz Sales Co., 98 F. 2d 999 (38 USPQ 15.)"

Knight-Morley Corp. v. Ajax Mfg. Corp., 81 USPQ 12 (14), 84 F. Supp. 215 (D.C. E. Mich. 1948).

"Where an issue is raised as to the validity of a patent granted by the United States Patent Office, the burden is upon the one disputing the decision of the Patent Office to overcome it, Linville v. Milberger, 29 F. 2d 610; Knapp v. Will, etc., Co., 273 F. 380, with every reasonable doubt to be resolved in favor of the patent. Linville v. Milberger, supra; Barkis v. California Almond Growers' Exch., 17 F. 2d 327. Defendant did not meet such burden in this case, so it must follow

that the patent granted must be held to be a valid one."

Finnerty v. Wallen, 78 USPQ 58 (59), 77 F. Supp. 508 (D.C.N.D. Cal. 1948).

Can this Court conclude that defendants' interpretation of the ambiguous drawing of the VERONESI patent (1927), in contradiction of the specification of such patent, is so clear as to leave no reasonable doubt as to the invalidity of plaintiff's patents, or that, even if so interpreted, it teaches the *three* system combinations of such patents? Can this Court conclude that the SCHMID British patent with its two pump units, intervening storage tank and no foot valve, teaches, contrary to the findings of the Patent Office, the system combination of Claim 11 of patent 285; and can this Court sustain the District Court in its finding that plaintiff's *three* system combinations would be *duplicated* by merely attaching an injector, or with respect to Claims 17 and 18 of patent 285, in lieu of an injector a pressure tank and pressure switch, to any one of the multi-pressure discharge pumps of the ENSSLIN, SULZER, RATEAU and STEPANOFF group of prior art patents?

Can it be said that such prior art, or the systems created by the District Court in the absence of any teachings thereof in the prior art, leaves no reasonable doubt as to the invalidity of plaintiff's patents and that the Patent Office, through its skilled experts, was wrong in issuing such patents? Are such proofs

so convincing of the invalidity of plaintiff's patents that, if the inventors' lives had been at stake instead of their patents, the Court would have no hesitancy in holding against them? Unless such is the case, then this Court must conclude that the validity of plaintiff's patents is unaffected by such prior art.

"In this connection it is necessary to determine the kind and nature of proof which must be made, in order to establish invalidity upon this ground. It seems that the authorities are uniformly to the effect that the burden is upon defendants to establish the defense of anticipation, and that 'every reasonable doubt should be resolved against him.' San Francisco Cornice Co. v. Beyrle (CCA 9), 195 F. 516, 518; 115 CCA 426, 428; Schumacher et al. v. Buttonlath Mfg. Co. (CCA 9), 292 F. 522, 531, and numerous cases cited. In as clear and emphatic language as may possibly be used, the supreme and circuit courts repeatedly have affirmed this rule, and without exception have required the same degree of proof as would be necessary if the life or liberty of the patentee himself depended upon the novelty of his invention. Moreover, this is not a harsh nor arbitrary rule of construction, but, on the contrary, one which is reasonable and beneficial, in accord with principles of common justice governing situations of this kind. *The plaintiff has disclosed to the world a device which by its use the defendants acknowledge to be useful. The experts of the Patent Office, after the most careful consideration, have pronounced it new.* Under these conditions, the law properly requires that all doubts as to the correctness of their action be removed before it

will permit a court to say that a patentee has not an exclusive right to his own disclosure."

Alliance Securities Co. v. Mohr & Son, 14 Fed. (2d) 793, 795, 796. (Affirmed in *Mohr & Son v. Alliance Securities Co.,* 14 Fed. (2d) 799 (CCA 9, 1926).)

F. Presumption of validity strengthened by interference proceeding.

Not only is the ordinary presumption of validity of plaintiff's patents strengthened to a degree bordering on finality by virtue of the most pertinent prior art having been considered and found wanting by the Patent Office during the prosecution of the applications of the patents in suit, but such presumption is further strengthened by the fact that the application of plaintiff's patent 285 survived a hotly contested interference in the Patent Office between the applicants of said application and defendants' employee RHODA, the patentee of their then owned RHODA patent.

G. Presumption of validity further strengthened by defendants' prior conduct and admissions.

Further strengthening the presumption of validity of plaintiff's patents and of primary significance is the former position taken by defendants with respect to the inventions involved, when they claimed they were the exclusive owners of such inventions.

The record shows without contradiction that plaintiff placed its systems embodying the patented combinations on the market early in March 1941 (R 414),

and in July 1941 distributed to the trade (R 412-413) its King pump circular, plaintiff's Exh. 20 (R 530), and in the latter part of 1941 (R 413), its catalog, plaintiff's Exh. 11; while in September 1941 (R 414-415) it publicly exhibited its said systems at the California State Fair at Sacramento in close proximity to an exhibit of defendants (R 383).

Early in 1942 and after plaintiff's systems were on the market and their advantages demonstrated, defendants came forth with their alleged new line of dual purpose water systems wherein they incorporated the inventions of plaintiff's patents. Furthermore and with surprising audacity in the face of their knowledge of plaintiff's systems, defendants filed, through their employee RHODA, an application for letters patent on their asserted new line of water systems, which application matured in the patent involved in the interference heretofore mentioned.

If the inventions lacked novelty, as the defendants now contend, why did they seek letters patent thereon and why engage in an expensive interference proceeding?

> "In the instant case, however, we could more readily reconcile defendant's effort to acquire an improvement patent of doubtful validity with its present asserted position that the improvement patent is invalid for want of patentable novelty, than we are able to reconcile its present asserted position with its previous claim to ownership of a rival application, to an interference contest in the Patent Office, and its asserted, subsequent discovery that both, its as well as Squire's inven-

tion were, after all, at all times invalid and that the product of Squire's and Eggers' efforts, evidenced mechanical skill only."

Russell v. J. P. Seeburg Corp., 51 USPQ 306, 308-309 (CCA 7, 1941) 123 Fed. (2d) 509, 512.

Defendants, prior to suit, extolled the virtues and advantages of their new line of water systems (accused systems) and widely proclaimed that the features thereof were *unique; that no control valve was required; that one could irrigate all day without interrupting the household pressure requirements; that one could save the cost of another pump and well by the use of their new dual purpose systems; and that the principle of operation was designed by their engineers and held by them under exclusive patent;* all of which statements appear in defendants' literature.*

The prompt adoption of plaintiff's systems by defendants is a recognition of their worth and novelty.

---

*We here quote from defendants' Bulletin 506, plaintiff's Exh. 14 (R 518 through 523) and Bulletin 501, plaintiff's Exh. 12 (R 511):

"Irrigate All Day Without Interrupting Your Household Pressure Service"

"A *unique* feature of Berkeley two and three stage water systems when installed for shallow well use is their two discharge openings, a high pressure outlet to the tank for sprinkler irrigation, and a low pressure opening suitable for filling stock tanks, flood irrigation, etc. Both may be operated simultaneously, or either one separately. Check the performance of these models on Page 21 against your shallow well needs—you may be able to *save the cost of another pump and well* by installing a BERKELEY DUAL PURPOSE." (R 523)

"*Developed by Berkeley engineers* in 1941, the two stage principle of operation described on page 16 is *held under exclusive patent* by the Berkeley Pump Company. Since that

The advertising bulletins extolling the virtues and uniqueness of the systems again pay tribute to the novelty and accomplishment of the inventions of plaintiff's patents; and this, coupled with defendants' claims of authorship of the inventions and that the principle of operation was held by them under exclusive patent, negatives their present contention of lack of invention.

"Furthermore, appellee's advertising extolled the result of the filleting function of the Wheatley improved flap as he had explained it to Kempel in 1924. Under these circumstances, we think that appellee is not in a position to deny infringement. See Gibbs v. Triumph Trap Co., 26 F 2d 312. Our conclusion in this respect is further supported by the relations of these parties and their statements and dealing with each other, and we are convinced that the court was not in error

---

time *many thousands* of these water systems have been giving their owners a quality of performance and durability that has met our best expectations. Available in one and one-half, two, three, and five horsepower sizes.

"*No control valve is required,* as its function is performed by the system of water circulation within the pump as described on page 16." (R 521)

"POSITIVE JET ACTION"

"*The upper impeller pumps only to the deep well jet,* and always has a source of water for this purpose. It is a fact not generally known that loss of prime in jet pumps is most frequently caused by insufficient force of water at the jet nozzle. By devoting one impeller exclusively to this function, the Berkeley design eliminates the principal cause of loss of prime." (R 519)

"*Self Adjusting* to
All Water Levels
Within Its Range
20 to 250 Feet"
(R 511)

in holding that appellee's structure infringed the patent if valid."

Wheatley v. Rex-Hide, Incorporated, 41 USPQ 124, 126 Aff'd 102 Fed. (2d) 940 (CCA 7, 1939).

One cannot help but wonder why, in view of the uniqueness, advantages and accomplishments of plaintiff's patented systems, defendants waited until such systems had been developed, advertised and placed on the market before coming out with their whole new line of systems incorporating the features of plaintiff's systems. If such combinations were old, as defendants now claim and the District Court found, why did defendants wait until plaintiff pointed the way, and why appropriate such combinations instead of adopting the structures of the prior art?

That the patented features were not obvious to Mr. CARPENTER, president of the corporate defendant and a practical engineer of long experience in the art of water systems employing the injector principle, is most aptly illustrated in his attempt to meet one of the needs of the farmer in supplying a dual purpose system back in 1940 when he filed the application of the CARPENTER patent No. 2,280,626 (R 526). To him, at that time, the solution was not obvious in a system of the injector type, for he employed a turbine pump, notwithstanding he was fully and probably more conversant with systems of the injector type and the advantages of the injector principle over the turbine type pump for trouble-free operation.

The foregoing illustrates the lack of obviousness of the three system combinations of plaintiff's patents, and this, coupled with the great age of the prior art and the incompatible change in position of defendants from one of praise and acknowledgment of the achievement and value of the systems of the patents in suit to one of belittlement and depreciation of such systems, based upon the premise that what was accomplished was old and perfectly obvious and required no inventive ingenuity, constitutes a forceful answer to the old and familiar attack now resurrected by defendants to invalidate plaintiff's patents.

> "He is attacked on the old lines. The accusation against him is one that every inventor must meet. The moment the solution of the problem is made plain those who did not see it seek to belittle the achievement of the one who did see it by the assertion that it was so exceedingly obvious and simple as to exclude the possibility of a demand upon the inventive faculties. This will not do."
>
> *Gould Coupler Co. v. Pratt,* 70 Fed. 622, N.D. N.Y. 1895.

IX.

CONCLUSION.

Until the judgment herein was rendered, plaintiff's patents were valuable properties. Each invention has made its contribution of advancement in the art and each has afforded to the user, benefits and economies of major importance, which facts the District Court expressly recognized.

Not only defendants, who were skilled and experienced in the industry, recognized and appreciated the inventive character of plaintiff's inventions, but the trained experts of the Patent Office came to the same conclusion when they granted plaintiff's patents.

Defendants, once plaintiff's systems were on the market and demonstrated, were prompt to seize upon their inventive features and incorporate them in their own new line of water systems. In their trade bulletins they extolled the merits of the systems and the magnitude of the inventions so appropriated, but when confronted with the charge of infringement, they resort to the time-worn defense that the patents are devoid of invention.

To sustain this contention, defendants rely primarily upon a foreign patent which was public knowledge for about 14 years before their adoption of plaintiff's systems, and which they now maintain disclosed the precise systems of the patents in suit. This foreign patent, however, especially when read in the light of its specification, clearly shows its inapplicability. Defendants' contentions deliberately ignore the teachings of the specification and rest upon an admittedly obscure and ambiguous drawing which they attempted to make certain by parol evidence.

The only claim which the District Court held not infringed was drafted by defendants to cover the accused systems and, consequently, there is no alternative but to find that such claim was infringed. Furthermore, when construed as expressed by defendants in their RHODA patent, no basis for anticipation by the

SCHMID patent exists, and it was so found by the Patent Office.

An examination of the record will not sustain the conclusion that the connection of an injector to certain other pumps described in patents cited by defendants will duplicate any of the systems of plaintiff's inventions or accomplish the same results, and there is no evidence to sustain the finding of anticipation or want of invention, which forms the basis of this appeal.

Plaintiff respectfully submits that defendants have not met the burden of proof that is imposed upon them to invalidate plaintiff's patents and that the record of this cause requires that the judgment of the District Court be reversed and that judgment be ordered for plaintiff as prayed for in its complaint.

Dated, Berkeley, California,
September 25, 1950.

Respectfully submitted,
CHARLES O. BRUCE,
NATHAN G. GRAY,
Attorneys for Appellant.

EDWARD BROSLER,
Of Counsel.

No. 12,540

IN THE

United States Court of Appeals

For the Ninth Circuit

JACUZZI BROS., INCORPORATED (a Corporation),

Appellant,

vs.

BERKELEY PUMP COMPANY (a Corporation), BERKELEY PUMP COMPANY (a Partnership), and FRED A. CARPENTER, LANA L. CARPENTER, F. F. STADELHOFER, ESTELLE E. STADELHOFER, JACK L. CHAMBERS, WYNNIE T. CHAMBERS, CLEMENS W. LAUFENBERG and MARIE C. LAUFENBERG, partners associated in business under the fictitious name and style of Berkeley Pump Company,

Appellees.

BRIEF ON BEHALF OF APPELLEES.

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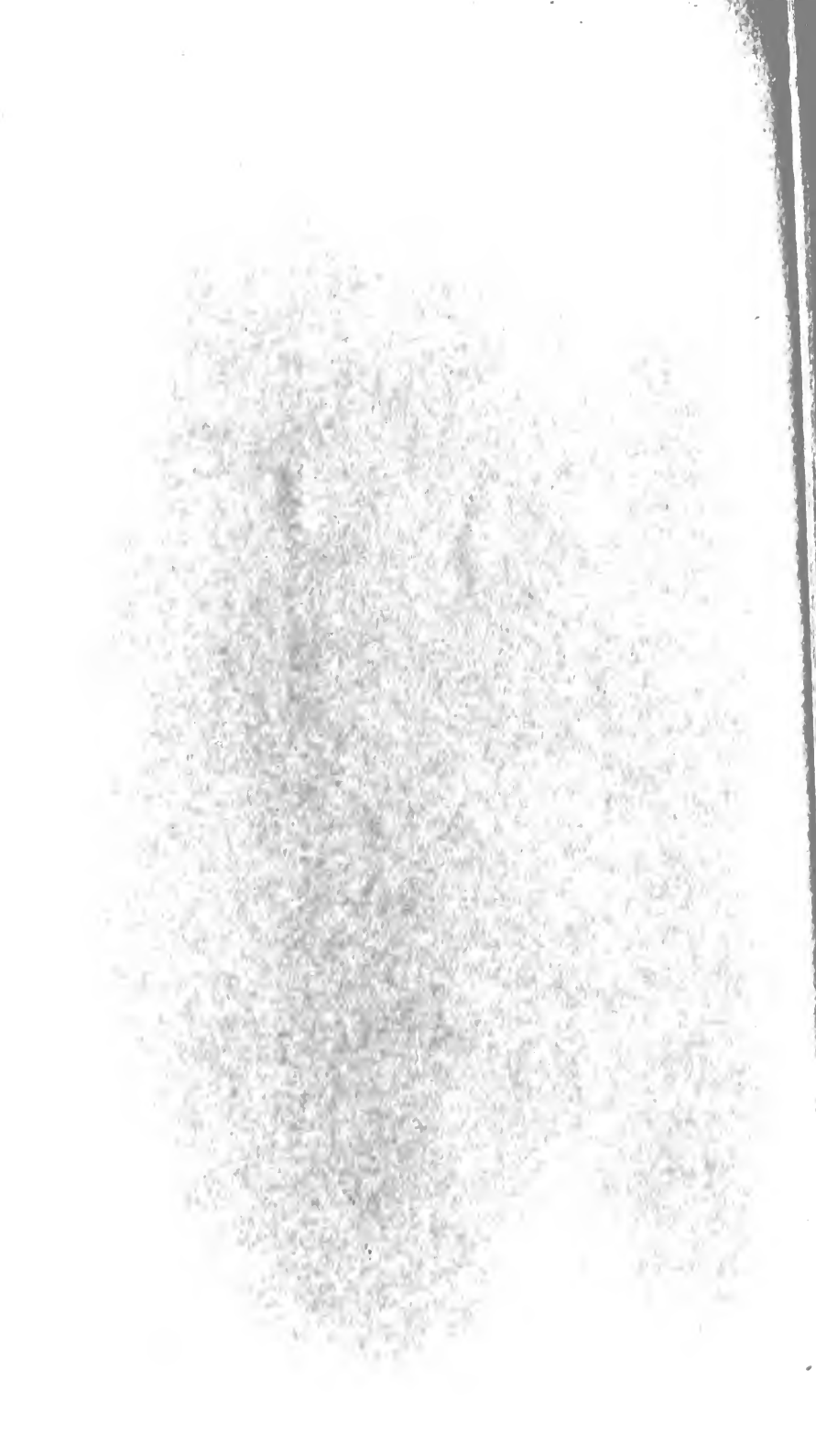

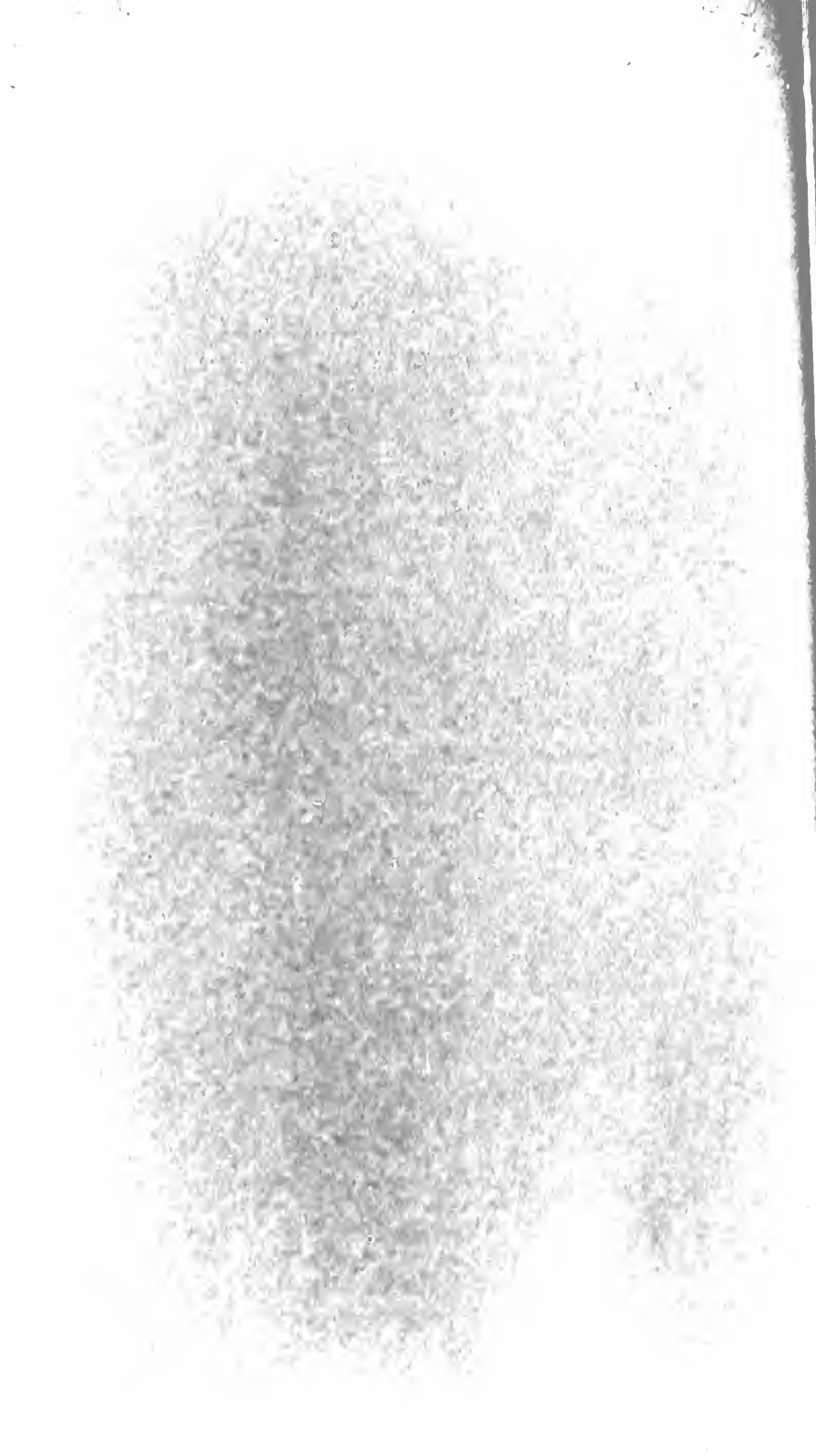

Subject Index

Table of Authorities Cited

Cases

Statutes

Rules

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Appellees.

BRIEF ON BEHALF OF APPELLEES.

SUMMARY OF THE ARGUMENT.

The findings of the District Court on the questions of novelty, anticipation, lack of invention, lack of patentable combination, and invalidity, being findings of fact, should not be set aside since they are

not clearly erroneous and are supported not only by substantial evidence but by the overwhelming weight of the evidence.

Appellant's contention that this Court of Appeals should give *de novo* consideration to the evidence and should review the prior art in disregard of the findings of fact of the District Court should be rejected. The trial Court held the patents totally invalid on several independent grounds, to-wit, lack of patentable invention, complete anticipation by the prior art, that the claims of the patents do not comply with R.S. 4888, and that the later issued of the two patents in suit was invalid for double patenting. The fact that the Patent Office issued the patents and the District Court found them invalid *is not such a conflict as should require this Court to give de novo consideration to the evidence and to the prior art.*

The patents here in suit do not come before this Court with any presumption of validity in that pertinent art relied upon by the District Court in finding lack of invention and invalidity was not before the Patent Office and the Patent Office did not refer thereto.

Appellant's argument in its brief, by which it attempts to bolster and prop up the invalid patents by clothing them with functional advantages and features which the record discloses and the District Court found to be old and present in prior art pumps, is based on false premises and finds no basis of fact in the record.

The pumps here in issue did not supplant or take the place of prior pumps, but at most merely supplemented the older line of pumps and did not supersede them or render them obsolete. The pumps at issue are merely the result of a continuous application of engineering skill to adapt existing pumps to progressing conditions such as the deepening of water wells in the state.

The step which appellant claims the patentees have taken and which is contended to be a patentable invention in the patents was merely to change prior water pumping systems only in degree and not in kind or character.

The prior art shows and the District Court found that pumps with selective or dual discharge, one at a lower stage than the other, are admittedly old and the substitution of such an old pump for the single discharge pump of prior water systems is not invention and involved at most no more than mechanical skill.

The pumping system shown in the Veronesi 1913 patent, Exhibit M (which was not before the Patent Office when they considered the patents in suit) completely nullifies any claim of novelty or invention of the patents in suit. The only difference between the pump shown in this Veronesi 1913 patent and the pumping systems of the patents in suit (as conclusively proven by the only evidence and the findings of fact of the Court) is the details of construction of the centrifugal pump which do not alter the

mode of operation or the result of the pumping system.

The Veronesi 1927 patent, Exhibit N, was found by the District Court upon substantial evidence to have the same construction, mode of operation and result produced as the accused pumps and, consequently, if the claims of the patents in suit embrace the accused pump, they also include the structure shown in the 1913 Veronesi patent, Exhibit M, and the 1927 Veronesi patent, Exhibit N, and are consequently invalid.

Appellant's contention that the patents in suit disclose a new combination is directly contrary to the facts as found by the trial Court, and the facts shown by the record. The record discloses jet pumping systems including a jet and a centrifugal pump in which there is a dual discharge from the centrifugal pump, one from a low pressure stage and the other from a high pressure stage directed solely to the jet. That the insertion into this system of any other type of old and well-known centrifugal pump, (if the construction thereof is important) would not make a new combination, but, to the contrary, would be an obvious, old, exhausted combination which could be effected without the exercise of invention, as the trial Court found as a fact.

The District Court found that the claims of the patents in suit "are so broadly drawn" as to include virtually every possible system in which a multiple pressure discharge is supplied from a pump with

an ejector attached. This is a finding completely sustaining the pleaded, independent and separate defense that the claims are invalid under R. S. 4888. The appellant did not specify such a finding to be error and did not argue that the claims are sufficiently definite to comply with said statute, and consequently this defense is sufficient in itself regardless of the validity of the remaining defenses to sustain the Court's conclusion that the patents are invalid, rendering the question of the validity of the remaining of the defenses moot.

The District Court found as a fact that claim 13 of patent No. 2,424,285 (the latest issued of the two patents in suit) in substance is identical with the claims in patent No. 2,344,958 (the earliest issued of the two patents in suit) which do not specify that the discharge opening to service is valve free. This is a complete finding that the pleaded defense that patent No. 2,424,285 is invalid for double patenting independently of the remainder of the defenses. The appellant has not specified such a finding as error or attempts to overcome in its brief the finding of double patenting. This defense, being sufficient in itself independently of the remainder of the defenses to sustain the Court's conclusion that patent No. 2,424,285 is invalid, the remainder of the defenses become moot.

The appellant argues that there is conflict between the facts found by the trial Court. Such conflicts, if there are any, are arrived at by straining the

language of the trial Court in its opinion and comparing them with specific findings of fact separately stated, and such conflicts, if any, are of a trivial and unimportant character.

Appellant argues in its brief that appellees' obtaining a patent on the precise construction of their centrifugal pump is a basis for inference that the patents in suit are valid and embody invention. The Courts never have drawn any such an inference because such an inference is too far-fetched to be given serious consideration. In the matter of declaring a patent valid or invalid, the Court looks to the rights of the public to see if a part of the public domain has been carved out by the patent and, therefore, adversely affecting the rights of the public.

ARGUMENT.

THE FINDINGS OF THE DISTRICT COURT BEING FINDINGS OF FACT SHOULD NOT BE SET ASIDE SINCE THEY ARE NOT CLEARLY ERRONEOUS AND ARE SUPPORTED NOT ONLY BY SUBSTANTIAL EVIDENCE BUT BY THE OVERWHELMING WEIGHT OF THE EVIDENCE.

In support of this conviction we rely upon recent decisions of this Court:

> "(3) We are of the view that the trial Court committed no error in its factual findings and that its determination and application of the law was and is correct.
>
> (4) The question of whether or not a new and useful combination is the result of mere

mechanical skill, or of inventive faculty, is one of fact.

(5) What constitutes invention as distinguished from a mere aggregation, is a question of fact.

(6) Questions of invention and patent validity are questions of fact.

(7) Whether prior art patents or publications disclose or anticipate the subject matter of a patent in issue is determined as a question of fact."

Faulkner v. Gibbs, 170 F. (2d) 34, at 37 (C.C.A. 9, 1948). (Rehearing denied 1948.)

"The court, by its above mentioned findings, determined two questions—the question of novelty and the question of invention. *Both were questions of fact.* Ralph N. Brodie Co. v. Hydraulic Press Mfg. Co., 9 Cir., 151 F. 2d 91 [66 U.S.P.Q. 396]; Maulsby v. Conzevoy, 9 Cir., 161 F. 2d 165 [73 U.S.P.Q. 249]. *The findings are supported by substantial evidence, are not clearly erroneous and should not be disturbed.* * * *"

Refrigeration Engineering, Inc. v. York Corporation, 78 U.S.P.Q. 315, at 317 (C.C.A. 9, 1948).

"* * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses * * *"

Federal Rules of Civil Procedure, Rule 52(a).

Only a portion of the evidence supporting the findings and conclusions of the District Court that the patent claims in issue are invalid can be presented herein. This portion of such evidence, it is submitted, is abundantly sufficient to establish that the findings and conclusions of invalidity are supported by substantial and overwhelming weight of evidence, and hence such findings and conclusions should not be disturbed.

APPELLANT'S CONTENTION THAT THIS COURT SHOULD GIVE DE NOVO CONSIDERATION TO THE EVIDENCE BECAUSE THE TRIAL COURT HELD THE PATENTS TOTALLY INVALID IN SPITE OF THE ISSUANCE THEREOF BY THE UNITED STATES PATENT OFFICE SHOULD BE REJECTED.

The appellant contends (appellant's brief, page 19):

> "Conflicting findings between the District Court and the Patent Office of the same prior art warrants de novo consideration thereof."

If this contention is valid, then in every case in which a trial Court holds a patent invalid on the usual grounds of lack of invention, lack of patentability, ambiguity of the claims, and double patenting, this Court of Appeals would be warranted in giving *de novo* consideration to the evidence. This position is untenable. To support this contention, however, appellant assumes and builds false premises which are:

(a) that the patents in suit come before this Court with the presumption of validity;

(b) that the trial Court relied for invalidity and lack of invention on the same art considered by the Patent Office.

These premises are shown by the record to be without foundation. The Patent Office considered in connection with both patents in suit only the following prior patents of those before the trial Court:

Jacuzzi No. 2,150,799, Exhibit T.
Ensslin No. 1,494,595, Exhibit R.
Veronesi No. 260,417, Exhibit N.
Schmid No. 382,592, Exhibit V.
Hilliard No. 1,059,994, Exhibit AJ-5.

These were but a part of the prior art patents considered and relied upon by the District Court in finding lack of invention and invalidity of the patents in suit. The following prior art patents, which were considered by the District Court and relied upon by the District Court in finding lack of invention and invalidity, were not before the Patent Office or considered by it in passing upon the patents in suit:

Veronesi No. 139,161 (1913), Exhibit M, R. 545—specifically relied upon by the District Court in Finding of Fact 16, one of the findings showing lack of invention of the patents in suit.

Speck (German) No. 376,684, Exhibit U, R. 591—used by the District Court in Finding of Fact 17, one of the findings showing lack of invention of the patents in suit.

Sulzer No. 704,144, Exhibit O, R. 561—specifically relied upon to show lack of invention

of the patents in suit in Findings of Fact 12, 27 and 28.

Rateau No. 730,842, Exhibit P, R. 564—specifically relied upon to show lack of invention of the patents in suit in Findings of Fact 12, 27 and 28.

Stepanoff No. 2,248,312, Exhibit Q, R. 569—specifically relied upon to show lack of invention of the patents in suit in Findings of Fact 12, 27 and 28.

Jacuzzi No. 1,758,400, Exhibit S, R. 579—specifically relied upon in Finding of Fact 16, which is one of the findings showing lack of invention of the patents in suit.

Therefore, it is to be noted that the Patent Office overlooked a great portion of the real pertinent art and, therefore, under the authorities of this Circuit, the presumption of validity which attends the issuance of the patent by the Patent Office is overcome and the patents are before this Court without any presumption of validity.

In a Ninth Circuit case, *Metler v. Peabody Engineering Corp.,* 77 Fed. (2d) 56, 58, the rule controlling here is given as follows:

> "The presumption of validity which attends the issuance of letters patent by the Patent Office is overcome in this case by the clear evidence of anticipation in the prior art which was not cited or considered by the Patent Office when

the application for appellant's patent was passed on."

To the same effect is the following:

France Mfg. Co. v. Jefferson Electric Co., 6 C.C.A., 106 Fed. (2d) 605:

> "The usual presumption of validity arising from the granting of the patent in suit is weakened when the Patent Office did not have its attention directed to the most pertinent art."

McClintock v. Gleason et al., 9th C.C.A., 94 Fed. (2d) 115, 116:

> "The strong presumption of validity arising from the granting of a patent is weakened when it appears that the patent is granted without reference to pertinent art."

O'Leary v. Liggett Drug Co., 150 Fed. (2d) 656:

> "The issuance of a patent creates no presumption of validity sufficient to overcome a pertinent prior art reference which has not been considered in the Patent Office."

It is, therefore, clear that the District Court in addition to the prior art considered by the Patent Office considered entirely different and more pertinent art, and, therefore, the patents stand before this Court without any presumption of validity, and unless appellant can show that the findings of the trial Court are clearly erroneous or not supported by substantial evidence, such findings should not be disturbed on this appeal and the evidence should not be given *de novo* consideration by this Court.

THE PUMPS HERE IN ISSUE DID NOT SUPPLANT OR TAKE THE PLACE OF PRIOR PUMPS BUT WERE NO MORE THAN THE NORMAL ADVANCE IN DESIGN OF THE PRIOR PUMPS TO ACCOMMODATE THE GRADUALLY RECEDING WATER LEVEL AND THE CONSEQUENT DEEPENING OF WATER WELLS IN A FEW AREAS OF CALIFORNIA.

The history of water well pumps, as shown by this record, is that such pumps were gradually changed to keep pace with the gradual changing or lowering of the water table in certain areas of the state, and the consequent gradual deepening of the water wells. (Armstrong's testimony R. 218-219, Carpenter's testimony R. 267-268, Jacuzzi's testimony R. 136.)

At first all of the wells were relatively shallow and the pumps of the general type here under consideration, as shown by the record, were small single stage centrifugal pumps (see page 11, Exhibit 17) without a jet. Then, as wells in certain areas were required to be deeper, jets were added to these single stage pumps to accommodate the increased depth. Then, as the wells in some areas continued to be deepened, and larger quantities of water were desired, the more efficient two stage pumps came into being which provided a greater delivery of water and at a more efficient operation, and at a lower speed. These two stage pumps were adapted both to shallow wells not requiring a jet and the deeper wells which required a jet. Then, as wells deepened, the two stage jet pump systems were enlarged by adding more stages to them, and finally when the pressures to operate the jets in certain restricted areas (because of the depth of the water table) became greater than it was necessary for

household use, or for irrigation, the designers accommodated this change by taking the discharge for use off of the low pressure of the pump and used the high pressure merely to operate the jet.

In other words, it was a continuous application of engineering skill to adapt existing pumps to the progressively changing conditions. However, there is still and always has been a need and a wide field even for the older type single stage pumps as well as the intermediate developments for the reason that different areas have different requirements, and because different farms have different requirements for water. Therefore, the present method of taking off the low pressure discharge from a low pressure stage of the pump and delivering the highest pressure discharge solely to the jet (even if new, which it is not) is no more than a carrying forward of the earlier pumping system in which the irrigation water at very low pressure was taken off ahead of the first stage of the pump while water from the highest stage of the pump was delivered back to the jet. It merely carried forward this old idea to a field of deeper wells.

At most, the pumps with the dual discharge, such as shown in the patents, merely supplemented the older line of pumps and did not supplant them or render them obsolete.

THE APPELLEES' PUMPS ADVANCED STEP BY STEP KEEPING PACE WITH FIELD DEMANDS.

As is evident from the record, appellees started with single stage pump—advanced to a jet—then a two stage pump with and without a jet; then a dual discharge pump, low pressure take-off ahead of the first centrifugal pump stage taking its pressure from the jet, and a high pressure take-off at the highest stage to the jet. All these pumps are still in the appellees' line as well as turbine pumps and others, so that all the various requirements of different localities as well as different conditions can be met.

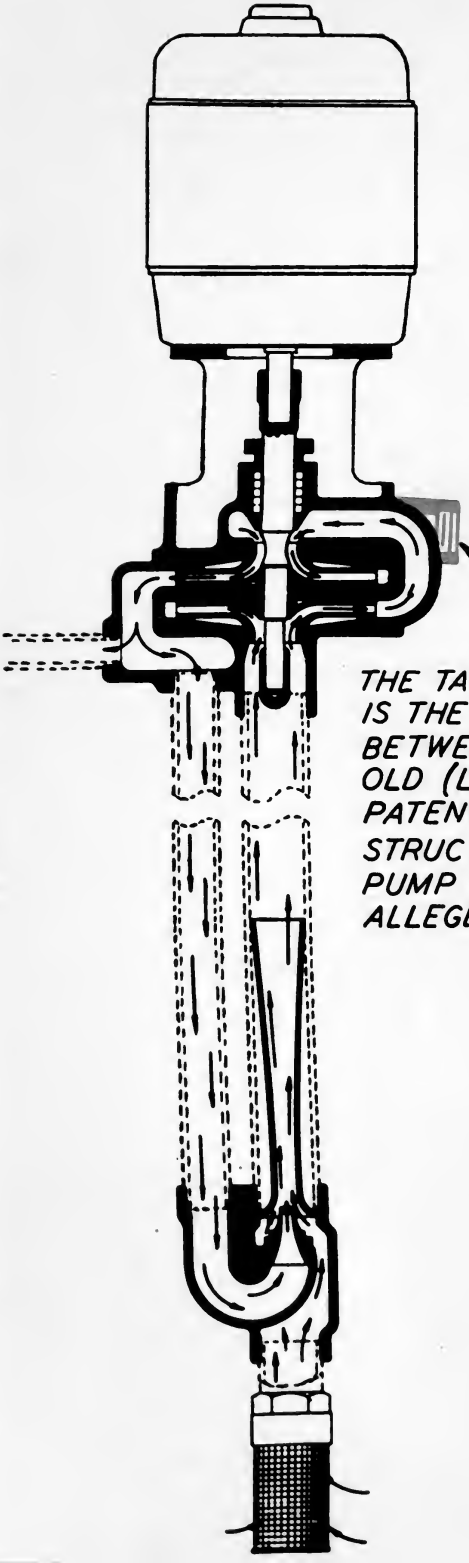
When the water table receded in certain localities, it was the natural thing to add a pump to meet this new and special condition. The only thing that appellees did which is charged to infringe is the appellees' tapping a hole in the pump casing for a discharge at the first stage. This gave appellees a single pump housing which by a system of holes and connections could be adapted to a wide range of conditions needing any of the following range of pumps:

a. shallow well pump without jet and single discharge;

b. shallow well pump with jet and a single discharge pressure;

c. deep well pump with jet and a single discharge;

d. shallow well pump without jet with dual discharge pressure;



THE TAPPED OPENING IN RED IS THE ONLY DIFFERENCE BETWEEN DEFENDANTS OLD (LONG PRIOR TO PATENTS IN SUIT) PUMP STRUCTURE AND THE PUMP STRUCTURES HERE ALLEGED TO INFRINGE

e. deep well pump with jet and dual discharge pressure.

All five meet widely varying conditions both as to well depths and pumping requirements.

What change was required? On the opposite page we illustrate what the record shows (in black) was appellees' prior pump. (R. 247-248.) The red colored addition was the only change made to change it from a non-accused pump to an accused one. Such change was the ordinary routine engineering change such as had been and always will be made from time to time to accommodate changing field conditions. Such slight, trivial changes are not inventions and should not be monopolized.

Certainly, the new pump for its special purpose is a good pump and does meet a new set of conditions and demands, but automobiles are likewise changed from year to year for the same reason but each such change therein is not considered invention.

In *Cuno Engineering Corp. v. Automatic Devices Corp.*, 314 U.S. 84, 86 L. Ed. 58, the Court said:

> "We may concede that the functions performed by Mead's combination were new and useful. But that does not necessarily make the device patentable. Under the statute 35 U.S.C. sec. 31, R.S. 4886, the device must not only be 'new and useful', it must be 'invention' or 'discovery'. Thompson v. Boisselier, 114 U.S. 1; 29 L. Ed. 76. * * *"

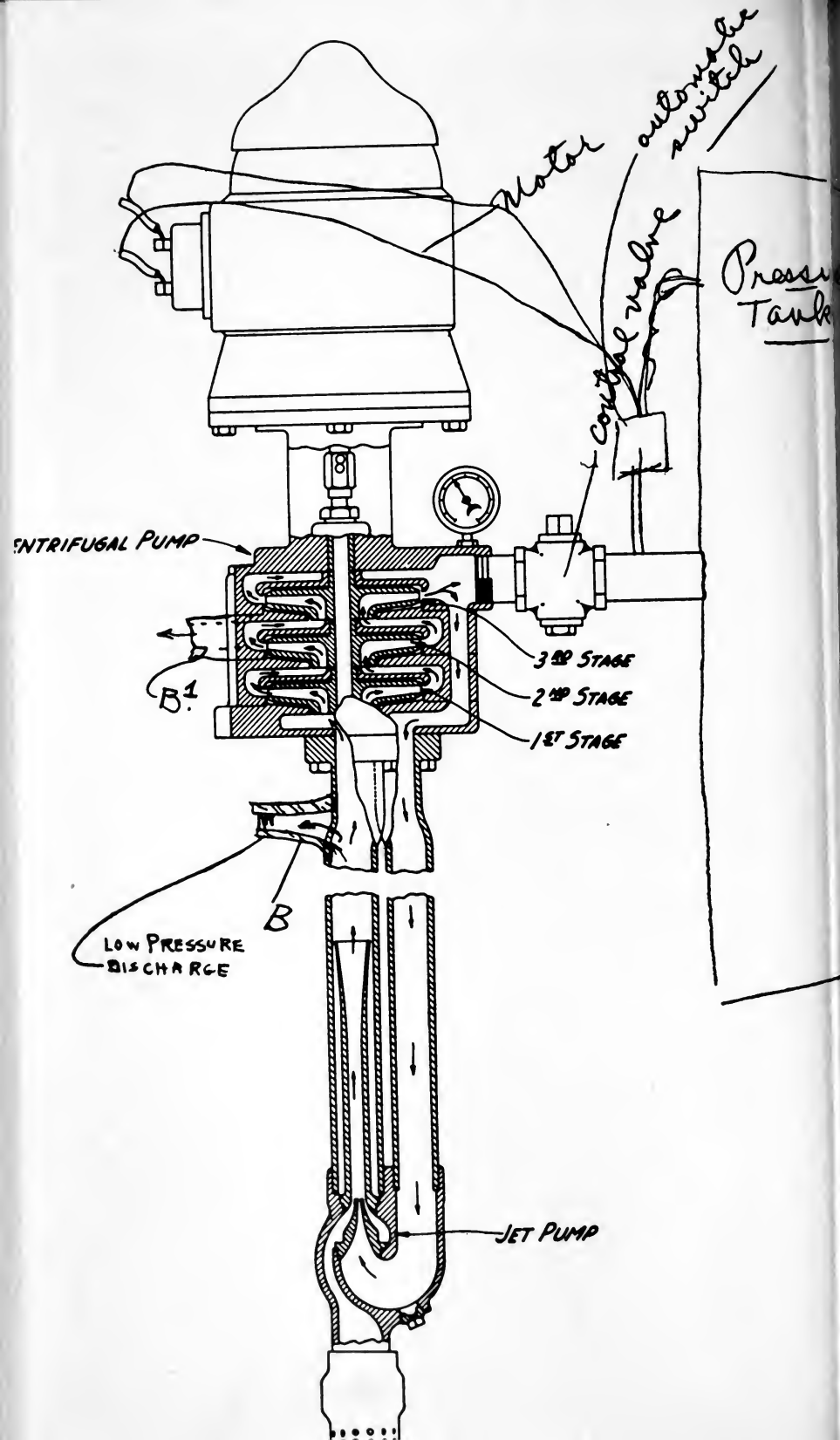
This Court of Appeals held in *Wilson-Western Sporting Goods Co. v. Barnhart,* 81 Fed. (2d) 108, as follows:

> " 'The process of development in manufactures creates a constant demand for new appliances, which the skill of ordinary headworkmen and engineers is generally adequate to devise, and which, indeed, are the natural and proper outgrowth of such development. * * * To grant a single party a monopoly of every slight advance made, except where the exercise of invention somewhat above ordinary mechanical or engineering skill is distinctly shown, is unjust in principle and injurious in its consequences.' "

THE STEP WHICH PATENTEES CLAIMED TO HAVE TAKEN AND WHICH IS CONTENDED TO BE INVENTION WAS TO CHANGE PRIOR WATER SYSTEMS ONLY IN DEGREE AND NOT IN KIND OR CHARACTER.

The appellant in its brief (as will be pointed out later herein) hides the actual step claimed to have been taken by the patentees by using many words. Stripped of all non-essentials that step was simply moving

> a. the low pressure discharge from a point in the water system just ahead of the first stage of the centrifugal pump (where it receives the water pressure from the jet pump) to a point on the centrifugal pump casing where it also receives the water pressure from the first or second stage of the centrifugal pump, or


Motor
automatic switch
control valve
Pressure Tank
CENTRIFUGAL PUMP
3RD STAGE
2ND STAGE
1ST STAGE
B1
B
LOW PRESSURE DISCHARGE
JET PUMP

b. moving the discharge to use from the highest stage to next lower stage.

Simply illustrated ("a" above), one admittedly old commercial system is shown in Exhibit A (reproduced opposite) (R. 535) with the low pressure discharge indicated thereon at B. The simple step taken by the patentees was to move that discharge to the point indicated thereon by B1. The only result actually achieved was that the pressure of the water emerging from discharge at B1 was greater than that emerging from discharge at B. This is merely a change in degree and did not effect either

a. a new mode of operation;

b. a new result different in kind or character;

c. an improved unforeseeable result unobvious to those skilled in the art.

These are the elements which are essential in order to find patentable invention.

Dr. Folsom testified that such change merely resulted in a difference in degree not in kind as follows (R. 294):

> "Now, Dr. Folsom, if you move the discharge B on Exhibit A from the suction line and put it where I am dotting it on the second stage and labeling it B-1, would you say that moving it from the suction line to that second stage would impart to that system a new or different mode of operation than it had when the discharge B was on the suction line?

A. The position of the low pressure discharge does not change the mode of operation of the pumping system."

He also testified that the mode of operation of the old system with the discharge at B was identical with the mode of operation of the system when the discharge was at B-1 (except as to the degree of discharge pressure) as follows (R. 294-295):

"Q. Would the difference in result obtained by moving the discharge B from the suction line to the second stage as marked at B-1, be one of difference in kind or a difference in degree?

A. Well, there is one that is difference in degree, because the location of the particular output or the particular location of that nozzle depends upon the requirements needed by the particular installation.

Q. And that difference would be one in the discharge pressure?

A. That's right.

Q. And that would be the only difference, Doctor, or not?

A. Right. The mode of operation is the same, the discharge takeoff is located from engineering considerations to give you the required pressure for the installation considered."

The fact that the only difference between prior pumps of the character here under discussion and the patented pumps is merely one of degree of discharge pressure is emphasized in the plaintiff's own catalog (Exhibit 11) of its commercial pumps.

To illustrate the second condition ("b" above) on the opposite page we have reproduced the illustration

THE ONLY CHANGE OR DIFFERENCE EFFECTED BY THE ALLEGED INVENTIONS IS MOVING THE DISCHARGE OUTLET FROM THE LAST STAGE (HERE) TO THE NEXT TO THE LAST STAGE (HERE) (RESULT! ONLY A LOWER DISCHARGE PRESSURE) THIS IS NOT INVENTION EVEN IF NOVEL.

JACU

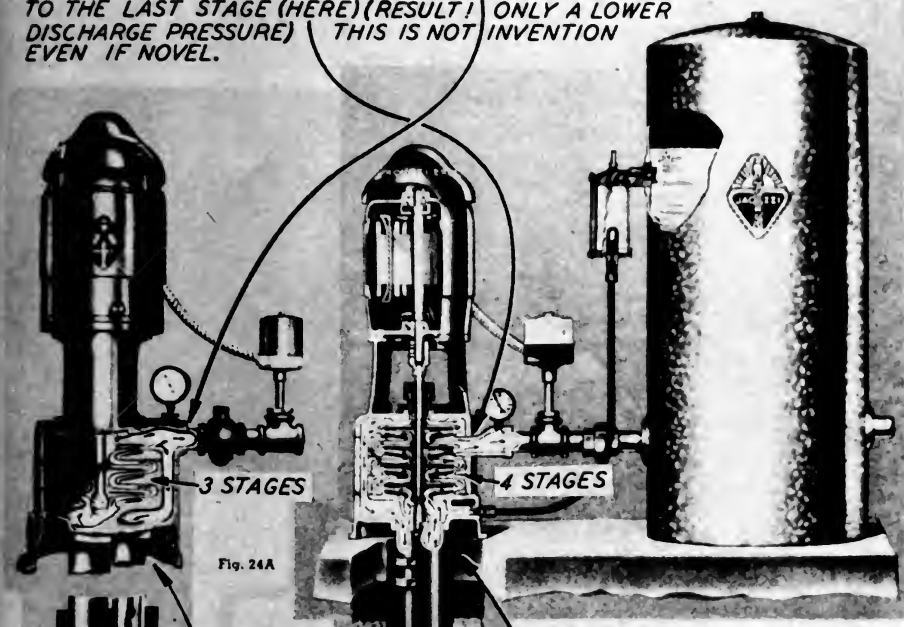


Fig. 24A

Fig. 34A

PLAINTIFF'S COMMERCIAL PUM EMBODYING THE ALLEGED INVENTIONS OF THE PATENTS IN SUIT.

PLAINTIFF'S 1939 COMMERCIAL PUMP PART OF THE PRIOR ART EX. T.

REPRODUCED FROM PLAINTIFF'S CATALOG EXHIBIT #11 PAGES 24 & 34

ED!

24a from page 24 of appellant's own catalog (Exhibit 11), showing the older type (part of the prior art as shown in Jacuzzi patent No. 2,150,799, Exhibit T, R. 584), and alongside we have reproduced Figure 34a which is the illustration on page 34 of the same catalog (Exhibit 11) which embodies the alleged invention of the patents in suit.

Notice that *the only difference* between the two* pumping structures is the fact that in the earlier pump structure (Figure 24a) the take-off for use is from the last stage, at which point the water is divided, part of it going to the discharge for use and the remainder going back to the jet. Then, refer to Figure 34a, which is the patented structure, and notice that the arrangement is precisely the same except that the discharge instead of at the last stage is from the next to the last stage, so that the take-off pressure is a little lower than the discharge of water for use from the pump shown in Figure 24a. Thus, the testimony and the evidence to the effect that the only difference between the patented pumps and those of the prior art is merely one of degree, and that is only the degree of discharge pressure, is amply sustained.

Appellant's attempt to rebut such evidence is illogical and insufficient.

In attempting to overcome such a logical conclusion, this appellant's witnesses simply stated such

---

*For the control valve in Figure 24a there is substituted in Figure 34a a mechanical water divider on the next to the last impeller. (Appellees do not use such a divider.)

change gave it a new mode of operation but gave no explanation to overcome the obvious correctness of Dr. Folsom's testimony that the change was merely one of degree. Mr. Jacuzzi, who attempted to contradict Dr. Folsom's testimony, testified simply that when you change the discharge from B to B1 (Exhibit A), you gave the system a new mode of operation. However, his idea of "new mode of operation" is that any slight change creates a new mode of operation. This he clearly demonstrated when *he testified that changing the low pressure discharge from one early stage of the centrifugal pump to another gave the system a "new mode of operation"*. That testimony appears at R. 163 and 164 and is as follows:

> "Q. When you change the low-pressure discharge from the second stage to the third stage, you do not change your mode of operation, do you?
>
> A. Yes."

(At this point Mr. Jacuzzi by clear inference corroborates Dr. Folsom that the only change is one of degree (of pressure). They merely disagreed as to whether a mere change in pressure is or is not a "new mode of operation".)

> "Q. That is still a different mode of operation, is that correct?
>
> A. That changes the mode of operation, because instead of taking it out at this point, we are bringing it up higher.
>
> Q. *The only difference is that you get a different pressure of the low pressure discharge?*

A. *You mean you are getting a different pressure once you are bringing it up here on an upper stage.*

Q. *That is right, you get a higher pressure on the upper one?*

A. *Higher pressure.*

Q. So you can select the pressure of the low-pressure discharge at any one from the first to the last stage?

A. Yes.

Q. *And when you make those changes, you do not change the mode of operation of the system, do you?*

A. *Yes.*

Q. *You do. Each one is a change in mode of operation of the system?*

A. *Yes.*"

This testimony shows the utter worthlessness of Jacuzzi's testimony in rebutting Dr. Folsom's testimony that whether the low pressure discharge was at B or B1, the mode of operation was the same with the change in result merely one of different pressure.

Therefore, we submit that the patented water systems do not have a new mode of operation nor do they produce a result different from the prior system of Exhibit A except to a matter of degree. In such state of facts the patents are invalid as lacking in patentable invention.

A change merely in degree is not patentable and this Court of Appeals has so ruled many times.

See *Wilson-Western Sporting Goods Co. v. Barnhart,* 81 Fed. (2d) 108, wherein the Court stated:

" 'But a mere carrying forward or new or more extended application of the original thought, a change only in form, proportions, or degree, the substitution of equivalents, doing substantially the same thing in the same way by substantially the same means with better results is not such invention as will sustain a patent.' "

* * * * * * *

" 'The process of development in manufactures creates a constant demand for new appliances, which the skill of ordinary head-workmen and engineers is generally adequate to devise, and which, indeed, are the natural and proper outgrowth of such development. Each step forward prepares the way for the next, and each is usually taken by spontaneous trials and attempts in a hundred different places. To grant a single party a monopoly of every slight advance made, except where the exercise of invention somewhat above ordinary mechanical or engineering skill is distinctly shown, is unjust in principle and injurious in its consequences.

" '* * * It was never the object of those laws to grant a monopoly for every trifling device, every shadow of a shade of an idea, which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufactures. Such an indiscriminate creation of exclusive privileges tends rather to obstruct than to stimulate invention. It creates a class of speculative schemers who make it their business to watch the advancing wave of improvement, and gather its foam in the form of patented monopolies, which enable them to lay a heavy tax upon the industry of the country, without contributing

anything to the real advancement of the art. It embarrasses the honest pursuit of business with fears and apprehensions of concealed liens and unknown liabilities to lawsuits and vexatious accountings for profits made in good faith.' "

See also the cases therein cited.

CENTRIFUGAL PUMPS WITH SELECTIVE OR DUAL DISCHARGE (ONE AT A LOWER STAGE OF THE PUMP THAN THE OTHER) ARE ADMITTEDLY OLD AND THE ADDITION OF A JET TO AN OLD CENTRIFUGAL PUMP AS TAUGHT BY PRIOR WATER SYSTEMS IS NOT INVENTION, BUT INVOLVED AT MOST NO MORE THAN MECHANICAL SKILL.

Particularly is the above demonstrated when it was admittedly old to provide a water system such as here at issue with a centrifugal pump and a jet. This is one of the old water systems which appellant's own witness Mr. Jacuzzi testified was old and well known (commencing at R. 154) and is diagrammed in the drawing. (Appellees' Exhibit A reproduced here opposite page 17.) That system, as Mr. Jacuzzi testified (R. 155-157), was built and used long prior to 1940.

Appellant has attempted to create the impression that the patents in suit disclosed the first multi-stage pumps with selective or dual discharges. This is far from the true facts for, as a matter of fact, such pumps have been in existence for many, many years prior to the patents in suit as the Court so found in Finding 12. (R. 80.)

Dr. Folsom, in testifying with respect to the prior art, in substance testified, and his testimony stands uncontradicted, that the Sulzer patent, Exhibit O (R. 561), discloses a pump having four stages with selective take-offs from any one of the four stages or a combination thereof. (R. 286-287.)

The Rateau patent, Exhibit P (R. 564), discloses a two-stage pump having a discharge from both stages. (R. 287-288.)

The Stepanoff patent, Exhibit Q (R. 569), discloses a multi-stage pump having one discharge from the fourth stage and a second discharge from the ninth stage, so that in normal operation fluid can be taken off at two different pressures. (R. 291.)

Dr. Folsom testified at length (at R. 300) that the 1913 Italian patent to Veronesi disclosed a multi-stage pump in a jet pump system having a mode of operation identical to those here involved, which discharges water at two different stages and at two different pressures. Also (at R. 304) he discussed the 1927 Italian patent to Veronesi, stating that this patent disclosed a multi-stage pump having discharges from two different stages, the one of higher pressure discharging solely to the jet, the lower pressure for use.

Automatic water systems including a pressure tank, an automatic pressure switch, a multi-stage centrifugal pump and a jet are admittedly old.* This being

*1913 Veronesi patent, Exhibit M. (R. 545.)
1923 Speck patent, Exhibit U. (R. 591.)
Jacuzzi system, Exhibit A. (R. 535.)
1927 Veronesi patent, Exhibit N. (R. 552.)

true, how then can it possibly be invention to substitute an old multi-stage centrifugal pump having such a dual discharge for the multi-stage centrifugal pump of an old well pumping system with a single discharge? Obviously, no more than ordinary mechanical skill was involved in making such change. Therefore, no patentable invention was involved and the Court so found.**

In *Cuno Engineering Corp. v. Automatic Devices Corp.*, 314 U.S. 84, 62 S. Ct. 37 (1941), the Supreme Court said:

> "* * * More must be done than to utilize the skill of the art in bringing old tools into new combinations. (Citing cases.)"
>
> * * * * * * *
>
> "We may concede that the functions performed by Mead's combination were new and useful. But that does not necessarily make the device patentable. Under the statute, 35 U.S.C. § 31, 35 U.S. C.A. § 31, R.S. §4886, the device must not only be 'new and useful', it must also be an 'invention' or 'discovery'. Thompson v. Boisselier, 114 U.S. 1, 11, 5 S. Ct. 1042, 1047, 29 L. Ed. 76. Since Hotchkiss v. Greenwood, 11 How. 248, 267, 13 L. Ed. 683, decided in 1851, it has been recognized that if an improvement is to obtain the privileged position of a patent more ingenuity must be in-

---

**Finding 46 (R. 91): "The pumping systems claimed in the claims of patent No. 2,424,285 would be substantially duplicated without invention merely by connecting an injector to one of the high-pressure discharge connections of the old and well known multi-discharge centrifugal pumps such as shown in patents Nos. 704,144, 730,842, 2,248,312 and 1,494,595, Defendants' Exhibits Nos. O, P, Q and R."

volved than the work of a mechanic skilled in the art. (Citing cases.)"

This Court of Appeals followed this rule in *Bailey v. Sears, Roebuck & Co.*, 115 Fed. (2d) 904:

"We conclude that the trial court was correct in holding that a mechanic skilled in the art of radio condenser and cabinet construction, given the problem of measuring or determining the position of the rotors of the condenser by means of a clock faced dial, with two hands, one faster and one slower, already used in that art, would not require or exercise inventive genius in designing the patented device. Hence, such a mechanic cannot claim a patent monopoly and exclude other skilled mechanics from using the same or its equivalent devices. Hence, we hold that there was no invention in the patent under consideration."

See also

Wirebounds Patents Co. v. H. R. Gibbons Box Co. (C.C.A. 7-1928), 25 Fed. (2d) 363, 365.

APPELLANT IN ITS ATTEMPT TO BOLSTER ITS INVALID PATENTS ATTEMPTS TO CLOTHE THEM WITH FUNCTIONAL ADVANTAGES AND FEATURES WHICH THE RECORD DISCLOSES AND THE DISTRICT COURT FOUND TO BE OLD AND PRESENT IN PRIOR PUMPS OF THE SAME CHARACTER.

Appellant, in its brief, pages 6 to 12 inclusive, attributes to its patented pumps functional advantages and features (all disclosed in the record to be old and so found by the District Court) as if they appeared for the first time in the patented pumps.

All of the functional advantages and features claimed for the patented pumps by appellant were old in prior art and commercial pumps, admittedly so in most instances by appellant's own witnesses. Those not so admitted to be old by appellant's own witnesses were shown to be old by the record and so found by the District Court. For example, in appellant's brief, pages 10 and 11, there appears:

> "Therefore, *a mere opening of the spigot at the end of the irrigation line* during quiescent periods of the pump unit will *automatically* bring about the starting of the pump unit, and it is not necessary to walk all the way back to the pump unit to throw a switch or manually operate any control for this purpose (R. 115)."

The above feature in pumps was not only shown to be old by the prior art, but was admitted by appellant's witness Jacuzzi in his testimony to be old.* On this point Mr. Jacuzzi testified (commencing R. 156) as to prior systems which were used by appellant, in which prior systems a motor, pressure-operated switch and pressure tank were used and when the spigot in the discharge line was opened at some distant point, the motor would immediately commence to operate. In fact, he attributed this identical operation to the prior art pump wherein a low pressure discharge was taken off of the suction line just prior to the first stage, and the discharge to the jet was from a high pressure stage (R. 157-159). Consequently, appellant's above quoted statement is mis-

*Found to be old by the District Court in Finding 40 (R. 89).

leading if it conveys that the patented construction was the first to provide such mode of operation.

Also, in appellant's brief, pages 11 and 12, appears the following:

> "The invention of combination C pertains to an *injector* type system which is self-balancing and consequently *inherently stable.*"
>
> "Complete elimination of control valves from the system and the cost thereof (R. 136, 458).
>
> "The self-balancing feature has its origin in the *discovery* by the patentees that, in a pump system employing the *injector* principle, if the injector assembly were supplied from a stage of the pump unit *other* than those from which the service discharge is taken and flow of water to the injector were *favored* over flow to service, the pump unit will automatically meet the changing requirements of the injector assembly with changes in conditions within the well, and thus eliminate the principal cause of a pump system losing its prime and becoming inoperative."

Appellant, in its brief, attempts to clothe "inherently stable," "self-balancing" and "no need for a control valve" with an aura of mystery and complication and says, in effect, it was a discovery of the patentees. Nothing is further from the fact. "Inherently stable" and "self-balancing" in pump parlance merely means a multi-stage centrifugal pump design in which a full supply of water is always available to the last or highest impeller stage of the pump, so that impeller stage will not be starved but will deliver the full quantity of water demanded of it.

When such provision in the centrifugal pump is made and the last impeller stage is connected to a jet or other medium to be supplied, the jet requirements of water will always be fulfilled simply because a full supply of water is always available to the last stage of the centrifugal pump to pump such water to the jet as the latter requires.

The patents in suit accomplish this "inherent stability" and "self-balancing" by *mechanically* dividing the water at the lower stage of discharge in a dual pressure pump. This *mechanically* insures that a measured full supply of water is delivered to the last stage, leaving the overage to discharge through the lower stage discharge. Without such mechanical division (because of the vertically stacked arrangement of the patented pumps), a restricting control valve would have to be placed on the intermediate discharge to build up a resistance to the discharge sufficient to insure delivery of a full measure of water to the last pump stage.* Thus, "mechanical division of the water" in the patents is substituted for a control valve.

The reason that a control valve or such mechanical division is necessary in the centrifugal pump of the

*The Court's attention is called to the fact that in the patent in suit '285 there is a control valve 50 discharging to the tank 58 from the stage of highest pressure. The reason that this control valve is necessary at that point is to restrict or back pressure the flow so that the water will be divided and part of it pumped back to the jet through the pipe 23. There is no way of mechanically separating the water at that point in that patent, so a control valve must be used due to the peculiar design of the pump itself.

patents is that the last stage is at an elevation higher than the intermediate stage so that the water has to travel uphill to it and cannot keep the last stage submerged by gravity.

This is peculiar only to the arrangement of the impellers or stages stacked on end with the highest stage impeller uppermost. If the same pump were disposed horizontally, no such mechanical division and no control valve would be necessary, as will be explained further herein, because such "inherent stability" and "self-balancing" and lack of necessity of a control valve is inherent in horizontally disposed multi-stage centrifugal pumps with dual discharges.

This "inherent stability" and "self-balancing" by insuring a full supply of water to the last stage without the use of a control valve in a multi-stage centrifugal pump with a dual discharge is old and well known and has long been accomplished in connection with such pumps. It was accomplished in prior dual multi-stage centrifugal pumps as well as in the accused multi-stage centrifugal pumps by arranging the low pressure pump discharge and the last stage impeller of the pump in such relative positions that the latter is always submerged in the water discharged by the preceding stage impeller by gravity, so that such last stage impellers get supplied with water first, and what is left over goes through the low pressure discharge—exactly the same end result as is accomplished by the patented pumps.*

*The District Court so found: see Findings of Fact Nos. 7, 8 and 11 (R. 78, 79 and 80).

Obviously, in this circumstance there is no need for a control valve because the design of the pump itself takes care of the "self-balancing" by insuring always a constant and full supply of water from the intermediate stage to the last stage.

Dr. Folsom in his testimony fully explains this, and *his testimony in this regard is the only testimony on the point and should be accepted as the fact.* Dr. Folsom first testified (R. 286) that the Sulzer patent (Exhibit O) discloses a multi-stage centrifugal pump with selective or dual discharges. At R. 288 Dr. Folsom testified that the Rateau patent (Exhibit P) likewise discloses a multi-stage centrifugal pump having a high pressure discharge from the last stage and a low pressure discharge from an intermediate stage. Dr. Folsom then went on to testify as to the reasons why and how, in these prior patents, the last stage is always kept completely fed with water despite the low pressure discharge, thus keeping the pump "self-balancing" and eliminating the need for a restricting type of control valve. He also testified that the manner in which this was accomplished in these prior dual discharge multi-stage centrifugal pumps was exactly the same as that used by the appellees in the accused pump to accomplish the same purpose. This testimony appears at R. 288 and R. 289 as follows:

> "Q. What would be the condition of the inlet opening or eye of the second stage when the pump is in operation?
>
> A. Due to the arrangement of the discharge valve, the eye of the second stage would be maintained submerged in water at all times.

Q. What effect, if any, would that have on the operation of the second stage, as far as delivering water to it?

A. In order to deliver water from the second stage, the inlet must be submerged.

Q. That is from the second stage. Is that condition of submergence and delivery of water to the second stage the same or unlike the condition shown in the pump in Exhibit 5 as far as the second stage is concerned?

A. It is alike.

Q. In other words, the second stage in the Rateau patent and the second stage in the Berkeley pump device shown in Exhibit 5 are both fed because they are maintained submerged during the operation of the pump, is that correct or incorrect?

A. That is correct."

The Court's attention is directed to the fact that although in the accused pumps the stages are stacked vertically, the discharge of the lowest stage is at the top of the stack so that water from the lowest pressure stage naturally maintains the highest pressure stage submerged, and it must, by the simple law of physics, be maintained submerged before any water can be delivered through the low pressure discharge at the highest elevation. This, as Dr. Folsom explained, is the same in operating principle as the prior Sulzer, Rateau and other dual discharge multistage centrifugal pumps. His testimony appears at R. 326 as follows:

"Mr. Mellin. Q. Now, with reference to Exhibit 5, Doctor, illustrating one of the defendant's

pumps, is it ever possible to stall the pump because too much water is drawn off of the low pressure?

A. You mean by stalling the pump, getting a condition where it will not pump water?

Q. That's right.

A. In the arrangement shown in Exhibit 5, no.

Q. And is it or is it not the reason for that, the submerged condition of the inlet eye of the second stage?

A. That is correct. If the inlet eye is submerged in the water, due to the gravitational effect inside the chamber."

Therefore, clearly there is no novelty or invention or any discovery by the patentees of the patents in suit that one can eliminate a control valve from a low pressure discharge of a centrifugal pump and make the same "inherently stable" and "self-balancing" by the provision of some medium for insuring a constant delivery of a full amount of water to the last or highest stage of the pump.*

Appellees' structure does not use any such positive water dividing means as shown in this patent but follows the teachings of the prior art in this regard, as pointed out just before herein.

Also in appellant's brief, page 10, the following is found:

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*The Court found in Finding 7 (R. 78) that the absence of control valves in the system is unimportant, and in Finding 8 (R. 79) that the means shown in the patents in suit for positively dividing the water so as to eliminate the necessity of a control valve was old in prior United States patent No. 2,150,799, Defendants' Exhibit T (R. 584).

"This, the patentees of patent 285 accomplished through not only recognizing but taking advantage of the phenomenon that during *quiescent* periods of the pump unit in a conventional type *pressure* system, the tank pressure will equalize or spread throughout those portions of the pressure system which happen to be in open communication with the pressure tank."

This characteristic of the pumping system of the patents is common to all pressure pumping systems heretofore used, and is not new in this particular system. "Equalization of pressure" or "automatic equalization" or "inherent equalization of pressure" in a water system has been an attribute of automatic water systems of this type for many, many years prior to the patents in suit. Mr. Carpenter so testified (without contradiction) at R. 357 as follows:

"A. In jet pipe pressure systems it is necessary that water equalize when they stop because it must be filled with water clear down to the foot valve.

Q. So that in all systems the whole system is full of water, isn't it?

A. Yes.

Q. And when you draw water from the system, if there is a storage tank, it equalizes back into the pump?

A. Yes.

Q. And when the pressure drops below the setting of the automatic switch, the pump commences to operate?

A. That is right.

Q. That is an inherent condition in pressure systems for how long, to your knowledge?

A. All centrifugal systems for as long as I can remember. To make a distinction, plunger pumps that do not need to be primed——

Q. I am talking about jet pipes, you understand, centrifugal pumps.

A. Jet pipe pumps have always equalized pressure.

Q. How long have you known of such systems?

A. Since 1925."

THE PUMPING SYSTEM SHOWN IN VERONESI 1913 PATENT, APPELLEES' EXHIBIT M (WHICH WAS NOT BEFORE THE PATENT OFFICE WHEN THEY CONSIDERED THE PATENTS IN SUIT), COMPLETELY NULLIFIES ANY CLAIM OF EITHER NOVELTY OR INVENTION IN THE PATENTS IN SUIT.

The Veronesi 1913 Patent (Exhibit M) was properly admitted in evidence.

Appellant in its brief, contends that the Veronesi Patent of 1913, No. 139,161 (Exhibit M) (R. 545) cannot be taken into account by either the trial Court or this Court because it was not pleaded in the answer and appellant was not given notice thereof, in accordance with 35 U.S.C.A., Section 69. This theory is directly contrary to the recent ruling by the Court of Appeals, Ninth Circuit, in the case of *Crowell v. Baker Oil Tools,* 153 Fed. (2d) 973. In passing upon the precise question here involved that Court *held that 35 U.S.C.A., Section 69, was superseded by the Federal Rules of Civil Procedure.* The Court there stated:

"* * * Therefore, it is unnecessary at this juncture to examine with technical nicety the allegations of the pleadings concerning these prior patents. However, *it should be noted that the nature of the pleadings is now controlled by the new Federal Rules governing civil procedure in the district courts of the United States and not by § 69 of 35 U.S.C.A.* (Patents), first enacted in 1870, 16 Stat. 208, U.S.R.S. § 4920." (Emphasis ours.)

This case is the last expression on the subject by the Court of Appeals, Ninth Circuit, and we believe the same to be the controlling authority.

Even if this Court holds that the contested patent and publications cannot be used as an *anticipating* reference, there is no doubt whatever but what it can be introduced to show the state of the art. *Oswell v. Bloomfield,* 113 Fed. (2d) 377; *Minnesota Mining and Manufacturing Co. v. Industrial Tape Corporation,* 168 Fed. (2d) 7 (Cert. denied).

The only differences between the Veronesi 1913 Patent (Exhibit M) and the pumping systems under consideration are negligible.

With reference to the Italian patent, Exhibit M, which appears at R. 545, the Court found (R. 82):

"16. Prior art Italian patent No. 139,161, Defendants' Exhibit M, discloses a multi-stage centrifugal pump with sets of impellers in parallel and an injector. The intake water is divided as it enters the pump, part going to one set of impellers and discharged for use at low pressure,

the remainder going to the second set of impellers and discharged under a higher pressure solely to supply the injector."

In other words, this patent, except for the fact that the impellers are in parallel and not in series, has precisely the same mode of operation as the accused pump and produces the exact same result as the pumps as claimed in the patents in suit.

The only testimony as to the exact similarity between the mode of operation and obtained results of the pumping system disclosed in this Veronesi patent and the pumping systems under consideration is the testimony of Dr. Folsom. *This testimony was completely uncontradicted and consequently should be accepted as fact in that Dr. Folsom is eminently well qualified to testify on the point and is of unimpeachable character.*

Dr. Folsom testified (R. 303) that except for minor structural details of the centrifugal pump, the *pumping system of that patent (Exhibit M) and the accused appellees' pump (Exhibit 5) are the same.* The testimony is as follows (R. 303):

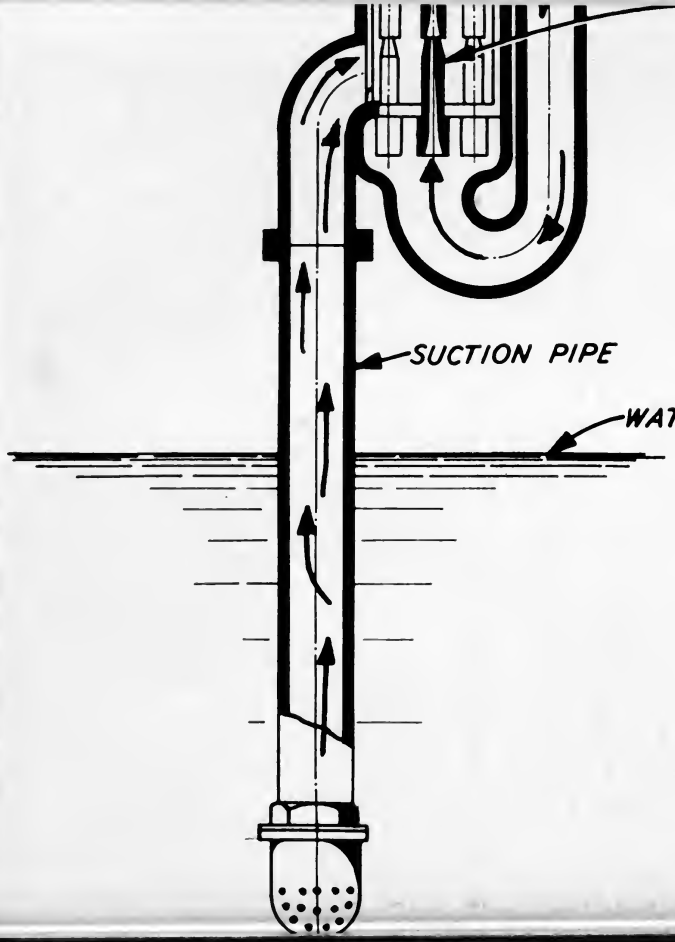
"Q. Thank you, Doctor. Now, Doctor, disregarding the fact that the water is divided between the high pressure and the low pressure portions of the pump in the Italian patent, M, is there any substantial difference in the mode of operation between the pumping system shown in that Italian patent and the mode of operation in the Berkeley pump (the accused pump) shown in Exhibit 5?

A. May I have that question again?
(Record read.)
A. Neglecting the details of the arrangement of the centrifugal pump, the pump system is the same."

Dr. Folsom had already testified that the differences in the centrifugal pump of the 1913 patent, Exhibit M, and the type used in the accused device were differences merely of design and of no operational importance in the system, and did not change its mode of operation nor the result obtained. In other words, the type of pump used was up to the taste and selection of the engineer. Both constructions of centrifugal pumps are equally efficient (R. 303):

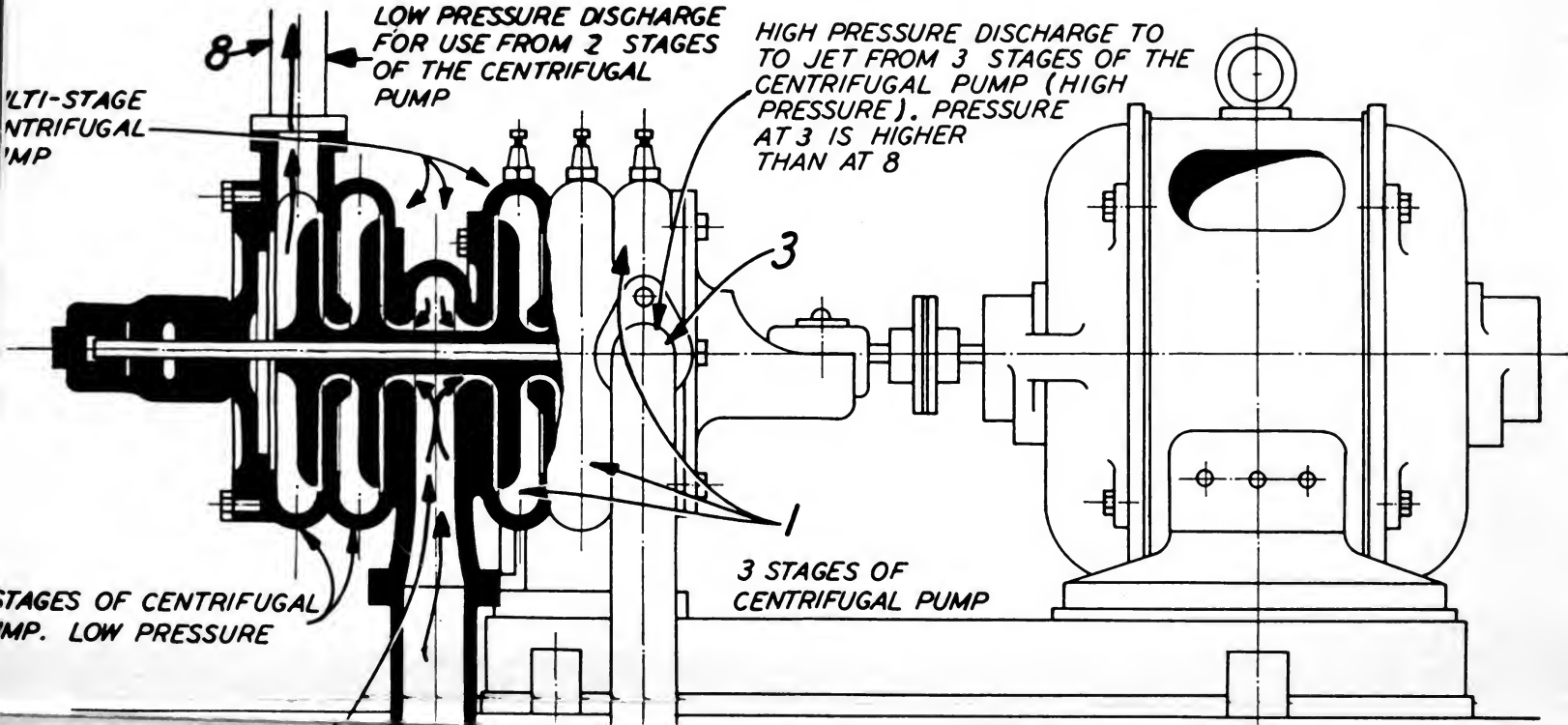
"Q. Does that Italian patent disclose to you an operative pump structure system?
A. Yes.
Q. And, Doctor, what about the efficiency of a pump of that character, where you are dividing it? Is it greater or less than if you had them in series, such as the Berkeley pump, No. 5, that you have alongside of it?
A. The efficiency is in the same order of magnitude. It depends more on the proportioning, the specific speed and other engineering features of the particular design is a consideration.
Q. In other words, that would be a matter of engineering skill, the skill of an engineer?
A. Right."

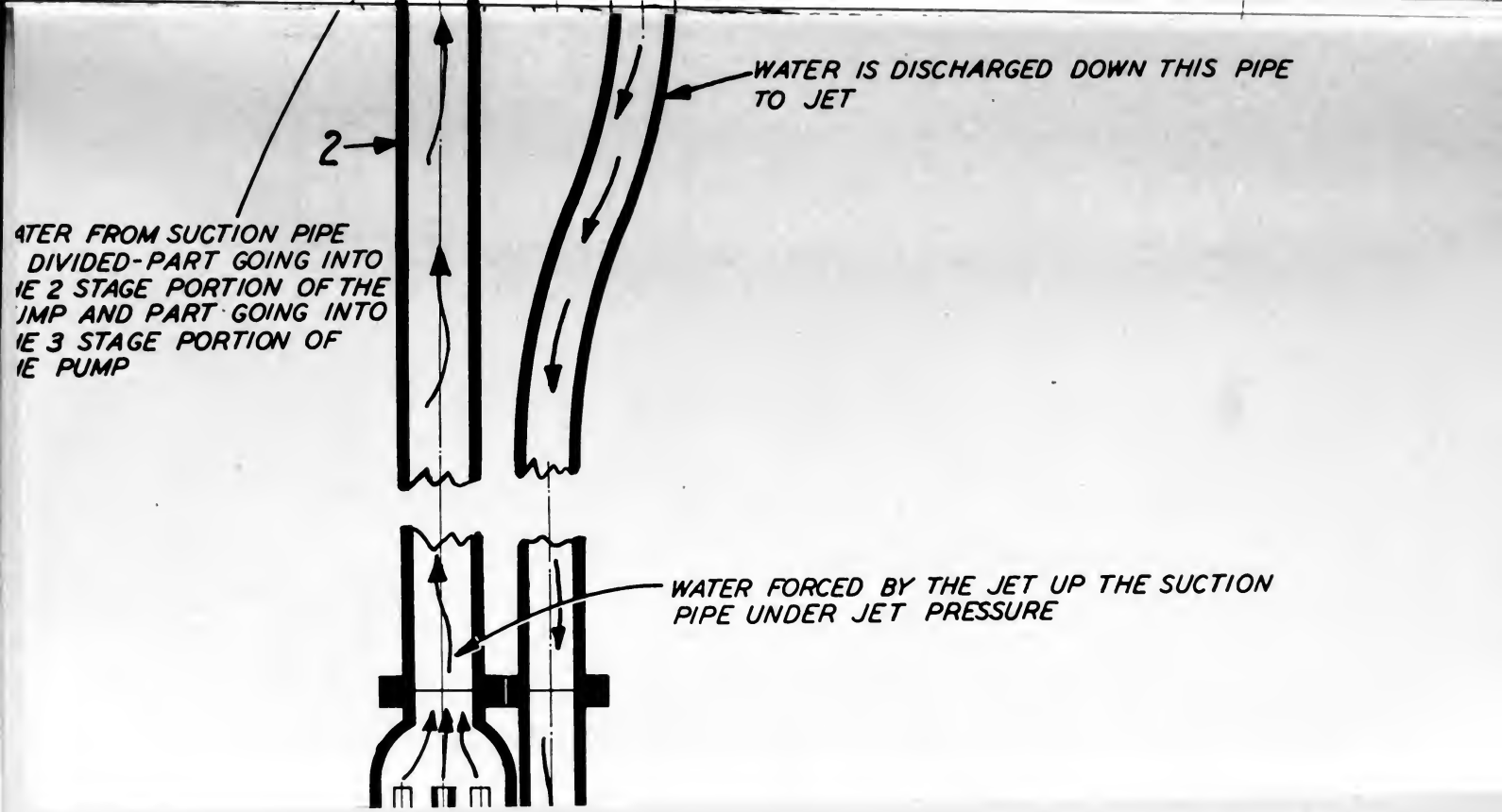
To enable the Court to graphically follow Dr. Folsom's testimony, we have illustrated the sectional



(SEE DR. FOLSOM'S TESTIMONY R 300-303)

1913 VERONESI PATENT (EX.M.)




WATER IS DISCHARGED DOWN THIS PIPE TO JET
2
ATER FROM SUCTION PIPE DIVIDED-PART GOING INTO IE 2 STAGE PORTION OF THE JMP AND PART GOING INTO IE 3 STAGE PORTION OF IE PUMP
WATER FORCED BY THE JET UP THE SUCTION PIPE UNDER JET PRESSURE

view of the drawing of Veronesi 1913 patent (Exhibit M) opposite this page and have applied the substance of Dr. Folsom's testimony thereon (R. 299-306).

From Dr. Folsom's testimony the only difference between appellees' accused pumping systems and that of Veronesi 1913 patent (Exhibit M) is the design of the centrifugal pump in the system which makes no difference in the mode of operation or efficiency in the system, as Dr. Folsom testified as above.

The appellees' centrifugal pump is just as different from appellant's as it is from the prior patent being in upside down arrangement with a reverse fluid flow. Consequently appellees' pump system having the same mode of operation as Veronesi 1913 patent (Exhibit M), if it also has the same mode of operation as the systems of the patents in suit, then the latter are the full equivalent of the Veronesi system of Exhibit M, and are anticipated thereby and clearly invalid.

Dr. Folsom's testimony was not contradicted by any witness nor did appellant offer any evidence whatsoever on said Exhibit M, so the record is bare of any evidence to the contrary.

For the Court's convenience we below set out a side by side comparison of the Veronesi 1913 disclosure (Exhibit M) and the accused pump.

Veronesi 1913 Disclosure.	Appellees' Accused Pump.
It includes:	It includes:
a. a multi-stage centrifugal pump	a. a multi-stage centrifugal pump
b. having a dual discharge	b. having a dual discharge
c. a low pressure discharge for use	c. a low pressure discharge for use
d. a high pressure discharge solely connected to a jet to operate the same	d. a high pressure discharge solely connected to a jet to operate the same
e. the jet forcing water from deep well into the suction of the centrifugal pump	e. the jet forcing water from deep well into the suction of the centrifugal pump
f. the water entering the suction of the pump being divided by the inherent characteristics of the pump casing design, and part discharging through low pressure discharge for use and part discharging through high pressure discharge to operate the jet	f. the water entering the suction of the pump being divided by the inherent characteristics of the pump casing design, and part discharging through low pressure discharge for use and part discharging through high pressure discharge to operate the jet

Consequently, we submit that the trial Court did not err in finding that the patents lacked invention.

Thus, if the accused devices come within the claims of the patent in suit, then the prior Veronesi pump also comes within those claims, and the claims are invalid as anticipated and cannot be infringed by the accused devices.

Obviously, the appellant was unable to meet this 1913 Veronesi patent, Exhibit M, squarely and the issue as to whether or not it completely anticipated the alleged inventions as claimed in the patents in suit

because in its brief it says not one word with respect to this Veronesi patent except:

> "the Veronesi patent of 1913 cannot be used for purposes of anticipation because not pleaded or otherwise introduced in advance of trial as required by 35 U.S.C.A. Section 69."

In other words, appellant attempts to waive off this patent and the Court's application thereof and its clear showing as an anticipation on the grounds that it was not properly pleaded. This is in error, as clearly pointed out in the first part of this title.

If one desired to use a pump having its impellers in series instead of in parallel it was only necessary to select such a pump from the prior art and substitute it for the pump of the 1913 Veronesi patent, Exhibit M, which would require no invention and which would not modify the pumping system one iota.

The Court so found (R. 80):

> "12. Multi-pressure centrifugal pumps of multi-stage character with the impellers in series and having a discharge at an earlier impeller stage to discharge part of the water thereat while directing the remainder of the water through the remaining stages and discharge were old in the art long prior to the suit and are exemplified in the prior patents to Veronesi, No. 260,417, Sulzer, No. 704,144, Rateau, No. 730,842, Stepanoff, No. 2,248,312, Ensslin, No. 1,494,595 and Schmid (British), No. 382,592, Defendants' Exhibits Nos. N, O, P, Q, R and V, respectively."

> "27. The pumping systems claimed in claims 1, 2, 4, 5, 6, 7, 8 and 9 of patent in suit No.

"21. That the Italian patent to Veronesi, No. 260,417, Defendants' Exhibit N, clearly discloses on its face the obvious presence of a low-pressure discharge opening communicating with the first impeller stage of the centrifugal pump for a low-pressure discharge to service.

"22. There are no dotted lines in the Veronesi patent drawing showing a passage through the pump casing from the chamber surrounding the first impeller to the discharge opening. But, the only reasonable purpose of the flow arrow drawn from the impeller chamber to the opening clearly indicates that the passage is there. Although dotted lines may be the standard method of indicating such pasageways, they are not always so used. This is significantly demonstrated by the drawings of plaintiff's own patents in suit Nos. 2,424,285 and 2,344,958, where plaintiff failed to indicate at least one obvious passageway in his drawings, either by dotted lines or a flow arrow.

"23. The presence of a low-pressure discharge opening and passageway from the chamber of the first impeller stage of the centrifugal pump disclosed in Veronesi patent No. 260,417, Defendants' Exhibit N, is not negatived by the statement in the specification of that patent to the effect that water after being raised to the desired pressure is divided into two portions, one portion being directed to the place of utilization and the other to the injector."

(R. 86):

"29. The pumping system described in claims 1, 2, 4, 5, 6, 7, 8 and 9 of patent No. 2,344,958 is

the precise system clearly disclosed in the prior Italian patent No. 260,417 to Hugo Veronesi, Defendants' Exhibit N."

The above findings clearly find that the system which is claimed as novel in the two patents in suit was clearly and unequivocally shown in the early Italian patent to Veronesi No. 260,417. These findings were based upon substantial evidence and, therefore, should not be set aside. The evidence upon which the findings are based is as follows:

With reference to the Veronesi 1927 patent, both Dr. Folsom and Mr. Layne, both pump engineers with long experience, testified that the disclosure therein was perfectly clear to them and they could readily and accurately determine the construction and mode of operation thereof without any information other than furnished by the patent itself. (Mr. Layne, R. 397, 398; Dr. Folsom, R. 324, 325.)

These witnesses testified positively that the disclosure of that patent clearly teaches an engineer by the drawing conventions and by the specifications thereof that the centrifugal pump has a low pressure discharge from the first stage and a high pressure discharge from the last stage. Also, that the low pressure discharge is for use—the high pressure discharge to operate the jet. This is the exact operation of the accused pumps as well as the precise function of the patented pumps as claimed in the patents in suit.

The physical pump casing (Exhibit Y) is a silent witness to the complete and logical reasoning of these

witnesses. This pump casing (Veronesi Deposition) (R. Vol. III) was actually built many years ago by Veronesi, the patentee, as part of his business in manufacturing pumps.

Opposite this page we include an illustration of the pump illustrated in the Veronesi patent, Exhibit N, R. 559, in accordance with the testimony and have placed statements thereon corresponding in substance to Dr. Folsom's and Mr. Layne's testimony.

Also, for the Court's convenience, we make a verbal side by side comparison of the Veronesi 1927 patent (Exhibit N) (R. 552) disclosure and the accused pumps.

Veronesi 1927 Patent (Exhibit N)	**Accused Pumps**
a. a multi-stage centrifugal pump (R. 304)	a. a multi-stage centrifugal pump
b. having a high pressure discharge from the last stage to the jet (R. 306)	b. having a high pressure discharge from the last stage to the jet
c. water under influence of the jet is supplied to suction of the centrifugal pump (R. 306)	c. water under influence of the jet is supplied to suction of the centrifugal pump
d. water passes through first stage of centrifugal pump (R. 307)	d. water passes through first stage of centrifugal pump
e. water from first stage goes into surrounding chamber (R. 307)	e. water from first stage goes into surrounding chamber
f. a portion of the water then discharging at low pressure through low pressure discharge (R. 307)	f. a portion of the water then discharging at low pressure through low pressure discharge

g. the remainder of the water passing through the last stage and being discharged under high pressure solely to the jet (R. 307)	g. the remainder of the water passing through the last stage and being discharged under high pressure solely to the jet
h. inherently self-balancing in that subsequent stages are maintained submerged in water flowing by gravity from a chamber into which first stage empties before passing to low pressure discharge (R. 305)	h. inherently self-balancing in that subsequent stages are maintained submerged in water flowing by gravity from a chamber into which first stage empties before passing to low pressure discharge
i. no control valve necessary because of facts set out in "h" above.	i. no control valve necessary because of facts set out in "h" above.

Thus, if the accused pumps are equal to the Veronesi disclosure and are included in the patent claims, then those claims include the Veronesi disclosure and are invalid as found by the trial Court.

Appellants' engineer (and patentee), Armstrong, agrees that the construction of the passage which both Dr. Folsom and Mr. Layne said the Veronesi patent conventionally illustrated between the chamber of the first stage and the low pressure outlet was the logical construction. See Mr. Armstrong's deposition, pages 153 and 154 as follows:

> "Q. And please answer this with the understanding that it is an assumption:
>
> On the assumption that there is a passage communication between the discharge outlet 9 and the register chamber between 'G' and 'J', or just externally of the diffusion vein, then that passage would extend radially downward,

wouldn't it, from 'G' out through 9, isn't that so?

* * * * * * *

A. I would say that would be the logical way to do it. It could be done by running it tangentially between two of the bolt holes.

* * * * * * *

Q. Now, the passageway that you are speaking of would be the passage between the arrows that I am marking on the drawing, and which I am marking 'K', is that right, Mr. Armstrong?

A. Yes." (Exhibit AJ-6.)

Dr. Folsom testified that no other construction of the pump of Veronesi 1927 patent was indicated at all. He testified (R. 323) as follows:

"Q. Now, Doctor, is there anything, conventional or otherwise, in the drawing of the Italian patent as Exhibit N, as shown in N-2 that indicates, discloses or suggests that the water may come from any other point to discharge from 9 except the first stage?

A. I find no such indication on the drawing."

The testimony of Dr. Folsom and Mr. Layne was not rebutted by appellant. An attempt so to do was made by the use of an *admittedly* erroneous and deceptive drawing attributing a falsified construction to the pump entirely foreign to the clear disclosure of the patent. Both Mr. Armstrong's and Mr. Granberg's testimony was based upon this *admittedly erroneous, deceptive and inaccurate* drawing and, therefore, such evidence is entitled to no weight. Mr. Armstrong's admission that the drawing upon which

their rebuttal was based was erroneous and deceptive is as follows (R. 472):

"Q. So there isn't any such wall, a, as shown in Exhibit 21 in N-2, is there?

A. Well, a and b could be the same wall in this case here.

Q. But they are not shown as the same wall in 21, are they? You said they contacted the boss in the bottom a moment ago and that is the way it is illustrated?

A. That is right.

Q. So to that extent, in order to make the drawing 21, you had to violate the construction shown in N-2 right on the very face of the drawing, didn't you?

A. It would appear that way.

Q. So that your testimony that 21 is an accurate illustration of the Italian patent N-2 is entirely erroneous, isn't that so, to that extent?

A. To that extent, yes.

Q. As a matter of fact, Mr. Armstrong, this drawing, No. 21, is completely deceptive as far as the illustration of the structure shown in the Italian patent N-2 is concerned, to that extent, isn't it?

A. To that extent. It reads on the specifications, though."

Mr. Granberg, far from a pump expert, would have the Court believe that the same convention used on both the drawing of the Veronesi patent (Exhibit N) and the patent in suit No. 2,424,285 would prevent passage of water where such passage was obviously intended. See his testimony. (R. 440-441.)

Measuring Granberg's biased demeanor and qualifications against those of Dr. Folsom and Mr. Layne the trial Court rejected Granberg's illogical testimony based on an erroneous and deceptive drawing and accepted the logical, and frank and clear-cut testimony of Dr. Folsom and Mr. Layne.

The Court upon this evidence found as above set forth that this Veronesi patent anticipated the patents in suit and the latter were invalid for want of invention.

We point out (R. 323-324) Dr. Folsom's testimony that this 1927 Veronesi patent (which claims novelty in the jet only, which jet is different from 1913 Veronesi) has the same mode of operation as the Veronesi 1913 patent (Exhibit M), excepting the design details of the centrifugal pump which is a matter of selection for the engineer. This testimony is as follows:

> "Q. Now, with respect to Exhibit N-2, the Italian patent N, the Italian patent M, and the drawing M-2, is there or is there not any substantial difference between the mode of operation of the two pumping systems shown therein?
>
> A. The mode of operation for pumping in the two systems is the same.
>
> Q. Will you point out the differences in the two systems, if any?
>
> A. The differences are involved in the arrangement of the centrifugal pumps, involved in the system. If its—in this one all fluid passes through the first stage, so that it is a series arrangement. Part of the fluid being taken off at this first stage. The remainder of the fluid passing

through, returning for its drive pipe, 2—that is in Exhibit M-2. In Exhibit N-2. In Exhibit M-2, the water is separated before it passes into the impellers of the centrifugal pump, instead of after passing through the first stage of the contrifugal pump. The mode of operation, which is an increase in pressure through the action of the centrifugal pump, occurs in both of the centrifugal pumps, the difference is in the arrangement.

Q. And are both plans from an engineering viewpoint feasible or not?

A. They are both feasible.

Q. And the difference is then, as I understand it, it is a difference in question of selection of a design or not?

A. It is a matter of design on the part of the engineer, as to which way he wishes to arrange the pump."

In that Dr. Folsom testified (R. 303-304) that the accused pumps had the same mode of operation as the Veronesi 1913 disclosure (except for pump construction details), it logically follows from the above that the accused pumps also follow the teachings of the 1927 Veronesi patent.

We submit that the findings of fact of the Court that the Veronesi patent, Exhibit N, discloses the precise system claimed in the patents in suit and discloses a pump having substantially the same construction and mode of operation as claimed in these patents are based not only upon substantial evidence, but the overwhelming weight of the evidence and,

consequently, these findings should not be set aside and the trial Court should not be found to have committed error in so finding and concluding.

APPELLANT'S CONTENTION THAT THE PATENTS IN SUIT DISCLOSE A NEW COMBINATION IS DIRECTLY CONTRARY TO THE FACTS AS FOUND BY THE TRIAL COURT AND THE FACTS SHOWN BY THE RECORD.

Appellant contends (appellant's brief page 47):

> "Plaintiff's systems involve a plurality of elements so co-related and assembled as to provide new combinations which have achieved new, improved, useful and beneficial results."

This is far from the facts as conclusively established by the record and found by the District Court. As the Court specifically found, the result achieved by the patents in suit was simply supplying high pressure water from the last stage of the centrifugal pump of the system to the jet and low pressure water from a stage preceding the last stage to service for use. These findings are (R. 85):

> "24. The claims of patent in suit No. 2,344,958 are intended and purport to cover the idea of isolating the injector so that it alone is supplied from the last impeller stage, and providing a service discharge from an impeller stage other than that from which the injector is supplied.
>
> "25. Claims 1, 2, 4, 5, 6, 7, 8 and 9 of patent No. 2,344,958 all describe a pumping system in which a pump unit with its impellers in series is

> tapped at an early impeller stage to feed a service line and at a subsequent impeller stage of higher pressure to feed an injector assembly and these claims differ only in details not germane to the question of invention."

Thus, the only result achieved is the supplying of low pressure water from one stage of the pump for use and high pressure water from the last stage of the pump solely delivered to the injector. This result, as the record shows and as the Court found, was an old result in jet pumps embodying the same combination, to-wit, a multi-stage centrifugal pump having its highest pressure stage delivered solely to the jet and its lowest pressure stage delivered solely for use. The District Court so found as follows (R. 82):

> "16. Prior art Italian patent No. 139,161, Defendants' Exhibit M, discloses a multi-stage centrifugal pump with sets of impellers in parallel and an injector. The intake water is divided as it enters the pump, part going to one set of impellers and discharged for use at low pressure, the remainder going to the second set of impellers and discharged under a higher pressure solely to supply the injector."

Thus, this Italian patent, Exhibit M, discloses the complete combination of the two patents in suit as claimed, except for the fact that the impellers of the multi-stage centrifugal pump are in parallel rather than in series. *This is not contradicted by any evidence submitted by appellant and is the only evidence in the case.* (See page 37 of this brief.)

The Court also found (R. 82):

> "17. Prior patent to Speck No. 376,684, Defendants' Exhibit U, is similar in all respects to the system of Italian patent No. 139,161, Defendants' Exhibit M, except the discharge to use is at a pressure higher than the discharge to the injector."

It will be noted that in this patent for some reason the pressure for use was wanted at a higher pressure than the pressure necessary to operate the jet or injector, but except for this, this is identical with the patents in suit, even including a pressure tank and an automatic switch which is pressure operated.

The Court also found as to the Schmid patent, Defendants' Exhibit V (R. 82), as follows:

> "18. The Schmid patent No. 382,592, Defendants' Exhibit V, discloses the basic idea of feeding a service discharge line from one impeller at one pressure and feeding the injector from a succeeding impeller at a higher pressure."

In Finding 19 (R. 83) the Court found that the pumping system disclosed in Veronesi, Defendants' Exhibit N, was composed of the same combination of elements as claimed in the patents in suit and achieved precisely the same result by the use of a centrifugal pump with the impellers *in series* as is the centrifugal pump of the patents in suit.

Thus, in at least three prior patents the entire combination of the patents as claimed is shown except for the specific fact that the pumps in Exhibit M and

and Exhibit U have the impellers in parallel instead of in series. The Court then went on to find, however, that substituting an old and well-known multi-stage centrifugal pump having the impellers in series with a discharge from a low pressure impeller and a discharge at its last stage impeller; that is to say, a low pressure and a high pressure discharge for the pumps in these old systems, would not amount to invention (R. 91):

> "46. The pumping systems claimed in the claims of patent No. 2,424,285 would be substantially duplicated without invention merely by connecting an injector to one of the high-pressure discharge connections of the old and well known multi-discharge centrifugal pumps such as shown in patents Nos. 704,144; 730,842; 2,248,312 and 1,494,595, Defendants' Exhibit Nos. O. P. Q and R."

Thus, if there is any combination at all of old elements in the patents in suit, it is an old exhausted combination completely shown in the prior art. Appellant complains that these prior patents fail to show the precise method of appellant's dividing the water within the pump, but the Court found as a fact in Finding 12 (R. 80) and Finding 8 (R. 79) that multi-pressure centrifugal pumps of multi-stage character with impellers in series and having a discharge at an earlier impeller stage to discharge part of the water thereat while directing the remainder of the water through the remaining stages and discharge were old in the art, and also that the specific means which the

patents in suit disclose for dividing the water within the pump between the discharges thereof was also old in the art.

Therefore, the combination, if any is specified by the claims, is an old and exhausted combination and is unpatentable. Under similar facts this Court has recently so held in *Gomez v. Granat,* 177 Fed. (2d) 266, wherein the Court stated:

> "In the instant case the interlocking ensemble was well known, and the dovetail joint was well known to the art. No new or unexpected result was obtained and hence we think the patent is invalid for lack of invention."

Obviously, no invention resides in appellant's pumping system because it is completely, fully and entirely met by the prior art and anticipated thereby, as found by the District Court.

THE DISTRICT COURT'S FINDINGS THAT THE CLAIMS OF THE PATENTS IN SUIT "ARE SO BROADLY DRAWN" AS TO INCLUDE VIRTUALLY EVERY POSSIBLE SYSTEM IN WHICH A MULTI-PRESSURE DISCHARGE IS SUPPLIED FROM A PUMP WITH AN EJECTOR ATTACHED ARE FINDINGS OF INVALIDITY OF THE PATENTS BECAUSE THE CLAIMS ARE FUNCTIONAL, AMBIGUOUS, INDEFINITE AND FAILING TO COMPLY WITH R.S. 4888.*

The defense that the claims of the patents in suit are so broad as to be invalid under R.S. 4888 was pleaded in appellees' answer to the complaint (R. 18) and raised in the counterclaim (R. 27 and 28) and denied in Answer to Counterclaim (R. 34).

The trial Court in Findings of Fact 41 and 42 (R. 90) on this issue and separate defense found as follows:

> "41. That claims 3, 9 to 14, inclusive, 17 and 18 of patent No. 2,424,285 are so broadly drawn as to include virtually every possible system in which a multi-pressure discharge is supplied from a pump with an ejector attached.
>
> "42. Claims 1, 2, 4 to 8, 15 and 16 of patent No. 2,424,285 are so broadly drawn as to include

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*Revised Statutes § 4888:

"Before any inventor or discoverer shall receive a patent for his invention or discovery he shall make application therefor, in writing to the Commissioner of Patents, and shall file in the Patent Office a written description of the same, and of the manner and process of making, constructing, compounding, and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound, and use the same; and in case of a machine, he shall explain the principle thereof, and the best mode in which he has contemplated applying that principle, so as to distinguish it from other inventions; and he shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery. * * *"

> virtually every possible system in which a multi-pressure discharge is supplied from a pump with an ejector attached, and which include virtually every possible means for dividing the input to the pump between a discharge outlet and the injector to assure an operating supply to the injector."

These are findings of invalidity because the claims are functional, ambiguous, indefinite and fail to comply with R.S. 4888. As we will point out to the Court at the end of this title in this brief, the appellant does not specify in its specification of errors that the Court erred in making such findings of fact, which are findings of fact of invalidity of the claims.

Claims of a character such as those in issue and found by the District Court to be so broadly drawn as to include virtually every possible system to accomplish the results of the patents in suit have been uniformly held invalid ever since 1853, commencing with the case of *O'Reilly v. Morse,* 15 How. 62, 112 (1853), 14 L. Ed. 601 (the telegraph case), in which our Supreme Court held:

> "He (Morse) claims the exclusive right to every improvement where the motive power is the electric or galvanic current, and the result is the marking or printing intelligible characters, signs, or letters at a distance. If this claim can be maintained, it matters not by what process or machinery the result is accomplished. For aught that we know, some future inventor, in the onward march of science, may discover a mode of writing or printing at a distance by means of the electric or galvanic current, without using any

part of the process or combination set forth in the plaintiff's specification * * *"

See also:

Risdon v. Medart, 158 U.S. 68, 77, 15 S.Ct. 745, 39 L.Ed. 899.

To the same end is the leading case of *General Electric Co. v. Wabash Appliance Corporation et al.,* 304 U.S. 364, 58 S.Ct. 899 (1938), in which the Court held:

"* * * But Congress requires, for the protection of the public, that the inventor set out a definite limitation of his patent; that condition must be satisfied before the monopoly is granted. * * *"

Universal Oil Products Co. v. Globe Oil & Refining Co., 322 U.S. 471, 64 S.Ct. 1111:

"* * * The claim is required to be specific for the very purpose of protecting the public against extension of the scope of the patent. (Citing cases)."

Boyden Power-Brake Co. et al. v. Westinghouse et al., Westinghouse et al. v. Boyden Power-Brake Co. et al., 170 U.S. 537, 707 (1898):

"The difficulty we have found with this claim is this: That, if it be interpreted simply as a

claim for the function of admitting air to the brake cylinder directly from the train pipe, it is open to the objection (held in several cases to be fatal) that the mere function of a machine cannot be patented."

Holland Furniture Co. v. Perkins Glue Co., 277 U.S. 245, 474 (1928).

Otis Elevator Co. v. Pacific Finance Corporation, 71 Fed. (2d) 641 (C.C.A. 9):

"* * * Although it is true, as petitioner suggests, that a function is not patentable because it is not within the patentable subject-matter defined in Rev. St. Sec. 4886 (35 U.S.C.A. Sec. 31), it is also true that a patent claim may be invalid for insufficiency of description under section 4888, because it describes the invention in terms of function or result without sufficient description of the means devised to accomplish that function or result. (Citing cases.)"

Otis Elevator Co. v. Pacific Finance Corporation et al., 68 Fed. (2d) 664 (C.C.A. 9, 1934).

"Even a casual reading of the claim and the master's finding discloses that the invalidity was not merely because of indefiniteness, but because it covered only a function."

B. B. Chemical Co. v. Cataract Chemical Co., 112 Fed. (2d) 526 (C.C.A. 2, 1941).

United Carbon Co. et al. v. Binney & Smith Co., 317 U.S. 228, 63 S.Ct. 165.

American Lava Co. et al. v. Steward et al., 155 Fed. 731 (C.C.A. 6, 1907);

Kalle & Co. et al. v. Multazo Co., Inc., 109 Fed. (2d) 321 (C.C.A. 6, 1940).

Following all these cases is the case of

Halliburton Oil Well Cementing Company v. Walker et al., 71 U.S.P.Q. 175 (decided Nov. 18, 1946), Sup. Ct.

"Under these circumstances the broadness, ambiguity, and overhanging threat of the functional claim of Walker become apparent. What he claimed in the court below and what he claims here is that his patent bars anyone from using in an oil well any device heretofore or hereafter invented which combined with the Lehr and Wyatt machine performs the function of clearly and distinctly catching and recording echoes from tubing joints with regularity. Just how many different devices there are of various kinds and characters which would serve to emphasize these echoes, we do not know. The Halliburton device, alleged to infringe, employs an electric filter for

this purpose. In this age of technological development there may be many other devices beyond our present information or indeed our imagination which will perform that function and yet fit these claims. And unless frightened from the course of experimentation by broad functional claims like these, inventive genius may evolve many more devices to accomplish the same purpose. See United Carbon Co. et al. v. Binney & Smith Co., 317 U.S. 228, 236 (55 U.S.P.Q. 381, 385-386); Burr v. Duryee, 1 Wall. 531, 568; O'Reilly, et al. v. Morse, et al., 15 How. 62, 112-13. *Yet if Walker's blanket claims be valid, no device to clarify echo waves, now known or hereafter invented, whether the device be an actual equivalent of Walker's ingredient or not, could be used in a combination such as this, during the life of Walker's patent.*

Had Walker accurately described the machine he claims to have invented, he would have had no such broad rights to bar the use of all devices now or hereafter known which could accent waves. For had he accurately described the resonator together with the Lehr and Wyatt apparatus, and sued for infringement, charging the use of something else used in combination to accent the waves, the alleged infringer could have prevailed if the substituted device (1) performed a substantially different function; (2) was not known at the date of Walker's patent as a proper substitute for the resonator; or (3) had been actually invented after the date of the patent. Fuller v. Yentzler, supra, at 296-97; Gill v. Wells, supra, at 29. Certainly, if we are to be consistent with Rev. Stat. 4888, a patentee cannot obtain greater coverage by failing to describe his inven-

tion than by describing it as the statute commands."

This Court of Appeals in *Farmer's Cooperative Exchange, Inc. v. Turnbow et al.,* 111 Fed. (2d) 728, followed the rule. In that case the Court said:

"Claim 8, of the claims in question, is one of the most specific. It is: 'A non-lethal parasiticide for internal administration, for intestinal parasites, comprising the combination of a nicotine substance in a dose normally parasiticidal to said parasites and lethal to the subject being treated on ingesting the same alone, and an organic colloid, said organic colloid rendering said dose non-lethal to the subject being treated and leaving it parasiticidal to said parasites.'

* * * * * * *

* * * As said in General Electric Co. v. Wabash Appliance Corp., 304 U.S. 364, 368, 58 S. Ct. 899, 901, 82 L. Ed. 1402: '* * * Recognizing that most inventions represent improvements on some existing article, process, or machine, and that a description of the invention must in large part set out what is old in order to facilitate the understanding of what is new, Congress requires of the applicant "a distinct and specific statement of what he claims to be new, and to be his invention." (35 U.S.C.A. § 33.) Patents, whether basic or for improvements, must comply accurately and precisely with the statutory requirement as to claims of invention or discovery. * * *'

The claims here violate that rule, and are void because 'conveniently functional language at the exact point of novelty' is used. General Electric Co. v. Wabash Appliance Corp., supra, 304 U.S.

371, 58 S. Ct. 903, 82 L. Ed. 1402. See, also Wood v. Underhill et al., 46 U.S. 1, 4, 5 How. 1, 4, 12 L. Ed. 23; The Incandescent Lamp Patent, 159 U.S. 465, 474, 16 S. Ct. 75, 40 L. Ed. 221.

In this connection appellees in attempting to distinguish General Electric Co. v. Wabash Appliance Corp., supra, contend that 'each and every of these claims specify the ingredients as well as the quantity or proportion of such ingredients'. We are unable to agree with that contention. *An entire class of ingredients is specified not specific 'ingredients'.* The quantity or proportion of the class is not specified except 'in conveniently functional language'.

The instant case is one illustrative of the practice followed in many patents. The inventors experimented with and compounded particular alkaloidal substances with particular colloidal substances. Instead of confining their claims to that which they actually discovered, if anything, they attempted to monopolize all parasiticides which could be made from the entire class of alkaloidal substances with the entire class of colloidal substances."

A further case in point is *Heidbrink et al. v. McKesson,* 290 Fed. 665 (C.C.A. 6, 1923). One claim in controversy was as follows:

"2. A gas-administering device having a mixing chamber, means for supplying thereto from independent sources of supply a plurality of gases each under pressure and in fixed proportions at their respective pressures, means for controlling the respective pressures at which the several gases are delivered to the mixing chamber, and means

for definitely regulating and determining the aggregate volume of flow of said gases into the mixing chamber at their respective pressures while maintaining said fixed proportions.

* * * * * * *

With this statement of the situation, we come to his two claims of 1,265,910. We are compelled to think that they are invalid because functional. They are apparently most deliberately and skillfully drafted to cover any means which any one ever may discover of producing the result; that is, to accomplish the one thing while avoiding the other. We think they are clearly to be condemned under the rule stated in O'Reilly v. Morse, 15 How. 62, 112, 14 L. Ed. 601, Risdon v. Medart, 158 U.S. 68, 77, 15 Sup. Ct. 745, 39 L. Ed. 899, and the many familiar cases applying the rule, and that they are not within the principle of the Telephone Case, 126 U.S. 1, 634, 8 Sup. Ct. 778, 31 L. Ed. 863."

Refrigeration Patents Corporation v. Stewart-Warner Corporation (C.C.A. 7), 159 Fed. (2d) 972, at 976.

"As an answer to this contention, the Halliburton case, supra, states: '*Patents on machines which join old and well-known devices with the declared object of achieving new results, or patents which add an old element to improve a pre-existing combination, easily lend themselves to abuse. And to prevent extension of a patent's scope beyond what was actually invented, courts have viewed claims to combinations and improvements or additions to them with very close scrutiny.* * * * *It is quite consistent with this*

strict interpretation of patents for machines which combine old elements to require clear description in combination claims. * * * Cogent reasons would have to be presented to persuade us to depart from this established doctrine.'

Appellees say that 'neither defendant, nor anyone else, need have any difficulty in determining whether its coil is so constructed and operated as to be non-frosting * * *.' Since a 'non-frosting coil' is a desired *result,* and not a means, it seems evident to us that patentees should be entitled at most only to their particular inventive means to achieve that result, not every possible means which may be conceived in the future to achieve the same result. As the Supreme Court said in the Halliburton case, supra: 'In this age of technological development there may be many other devices beyond our present information or indeed our imagination which will perform that function and yet fit these claims. And unless frightened from the course of experimentation by broad functional claims like these, inventive genius may evolve many more devices to accomplish the same purpose. * * *.' ''

We have discussed these findings of invalidity to show the Court that such findings are not erroneous. There is no specification in appellant's brief that the Court erred in so finding, nor does the appellant anywhere in its brief argue that these findings were in error in finding the claims invalid under R.S. 4888 as pleaded. Therefore, appellant has waived his right to assert error as to these findings and the conclusion of the trial court of invalidity of the patents should be

affirmed. This makes the remainder of the contentions of error as to other separate defenses raised by appellant moot.

Appellant recognized the effect of the above findings because in its statement of points on appeal (R. 490) it sets forth that the Court erred—

> "3. In finding that Claims Nos. 1, 2 and 4 through 9 of said patent No. 2,344,958 are so broad that they define no invention and are invalid;"

and erred

> "8. In finding that Claims Nos. 3, 9 to 14, 17 and 18 of said patent No. 2,424,285 are so broad that they define no invention and are invalid;"

However, appellant's failure to specify error as to these findings in its brief, or to argue the matter therein with respect to R.S. 4888, constitutes a waiver of its right to contend that the findings are in error, as has been frequently held by this Court.

A case on all fours is the case of *Mason v. Anderson-Cottonwood Irr. Dist.,* 126 Fed. (2d) 921, decided by this Court March 21, 1942. In that case the alleged error appeared in the statement of points filed by appellant but was not mentioned in the specification of errors, in the brief, or argued therein, and this Court refused to consider such error, stating:

> "But one other matter need be noticed. In the district court appellant filed a statement of points in which he designated twenty-two errors proposed to be relied on upon the appeal. Point 14 was that 'the Court erred in fixing a period of

twelve months within which creditors of the district must present their claims to the registrar for payment pursuant to the plan of composition, in that such term should not be restricted to the period of twelve months.' However, in his specification of errors in this brief appellant failed to mention this point, nor did he touch upon it in any way until the oral argument.

"Our rule 20, subdivision 2(d), provides that the brief shall contain 'a specification of errors relied upon which shall be numbered and shall set out separately and particularly each error intended to be urged.' In view of the failure to specify the point or to argue it in the brief, the alleged error will not be considered.

"Affirmed."

An earlier case to the same point was decided by this Court, which is the case of *Bank of Eureka v. Partington,* 91 Fed. (2d) 587, the Court stating:

"There are four assignments of error. Assignment 1 is not argued or discussed in appellant's brief and is, therefore, deemed to have been abandoned. Forno v. Coyle (C.C.A. 9) 75 F. (2d) 692, 695. Appellant's brief states:"

See also the case of *Humphreys Gold Corporation v. Lewis,* 90 Fed. (2d) 896, wherein the Court stated:

"There are nine assignments of error. Two of the assigned errors (assignments 1 and 2) are not specified in appellant's brief, as required by our rule 24, and are, therefore, disregarded. Mutual Life Ins. Co. v. Wells Fargo Bank & Union Trust Co. (C.C.A. 9) 86 F. (2d) 585, 587; United States

v. Los Angeles Soap Co. (C.C.A. 9) 83 F. (2d) 875, 889; Hultman v. Tevis (C.C.A. 9) 82 F. (2d) 940, 941; Berry v. Earling (C.C.A. 9) 82 F. (2d) 317; Gelberg v. Richardson, (C.C.A. 9) 82 F. (2d) 314, 315; Gripton v. Richardson (C.C.A. 9) 82 F. (2d) 313, 314."

THE DISTRICT COURT FOUND AS A FACT "CLAIM 13 OF PATENT NO. 2,424,285 IN SUBSTANCE IS IDENTICAL WITH THOSE CLAIMS IN PATENT NO. 2,344,958 WHICH DO NOT SPECIFY THAT THE DISCHARGE OPENING TO SERVICE IS VALVE FREE" AND IT THEREFORE FOLLOWS AS A MATTER OF LAW THAT PATENT NO. 2,424,285 IS INVALID FOR DOUBLE PATENTING.

The District Court found as a fact on the issue of double patenting raised by paragraph VI of Answer to Complaint (R. 19) as follows:

> "6. The claims of the two patents in suit fail to express clearly the line of division between them, and one must resort to the specifications to determine it; for example, claim 13 of patent No. 2,424,285 in substance is identical with those claims in patent No. 2,344,958 which do not specify that the discharge opening to service is valve free."

Manifestly, it follows, as a matter of law, from this finding of fact that the later patent, which is No. 2,424,285 is invalid.

Appellant did not specify the above finding of fact by the District Court as error in its specification of errors and makes no attempt in its opening brief to controvert it or show that there was any evidence to

the contrary or that it was not supported by substantial evidence. Consequently, the judgment of invalidity of this patent appealed from should be affirmed.

It is clear from the record of this case that Letters Patent No. 2,424,285 is invalid because, as the District Court found as a fact, both patents have identical claims and claims of the later patent cover the same pump structure claimed in the earlier Letters Patent No. 2,344,958 and, therefore, appellant is guilty of double patenting.

For the convenience of the Court we set out claim 13 referred to by the Court of patent no 2,424,285, which appears at R. 503, and claim 5 of patent No. 2,344,958, which appears at R. 509.

Claim 13 of Patent No. 2,424,285	**Claim 5 of Patent No. 2,344,958**
A pump system for a well, comprising a pump unit having a plurality of stages stacked for operation in series, with each stage feeding into the succeeding stage in the series;	A pump system for a well, comprising a pump unit having a plurality of stages in series, from which discharge at any one of a number of pressures may be taken;
a suction line connected to the input of said pump unit;	a suction line connected to the input of said pump unit;
an injector assembly in said suction line and including a venturi and a nozzle;	an injector assembly in said suction line and including a venturi and a nozzle;
a pressure line connecting said nozzle to said pump unit at a point of high discharge pressure;	a pressure line connecting said nozzle to said pump unit at a point of high discharge pressure; a pressure chamber;
and a discharge connection from said pump unit with a	and a discharge connection to said pressure chamber from

pressure value lower than that to said nozzle by an amount sufficient to maintain said injector assembly operative at the lowest normal level of water in said well.

said pump unit at a pressure value lower than that to said nozzle by an amount sufficient to maintain said injector assembly operative at the lowest normal level of water in said well.

We call the Court's attention to the fact that the only difference between these two claims of the two patents is that claim 5 of the earlier patent is slightly narrower than that of No. 2,424,285 in that it includes the non-essential limitation of a pressure chamber (admittedly old in the art) to which the low pressure discharge from the pump is connected.

That these claims are of identically the same scope in substance is uncontrovertible, and clearly claim 13 of the later issued patent, which issued in 1947, would include the pumping system defined in claim 5 of the earlier issued patent, issued in 1944, and extend the monopoly approximately three years on the pump shown in the earlier 1944 patent No. 2,344,958. This is clearly a case of double patenting and clearly evidences the fact that the District Court committed no error in its finding of fact No. 6 (R. 78) that "claim 13 of patent No. 2,424,285 in substance is identical with those claims in patent No. 2,344,958 which do not specify that the discharge opening to service is valve free".

The Supreme Court has clearly expressed the rule of double patenting in the case of *Miller et al. v. Eagle Manuf'g Co.,* 151 U.S. 186, 14 S.Ct. 310, where it stated:

"* * * If, upon a proper construction of the two patents,—which presents a question of law to be determined by the court, (*Heald v. Rice,* 104 U.S. 749), and which does not seem to have been passed upon and decided by the court below,—they should be considered as covering the same invention, then the later must be declared void, under the well-settled rule that two valid patents for the same invention cannot be granted either to the same or to a different party.

"Thus, in *Manufacturing Co. v. Hayden,* 3 Wall. 315, it was held that where two patents, showing the same invention or device, were issued to the same party, the later one was void, although the application for it was first filed; thereby deciding that it is the issue date, and not the filing date, which determines priority to patents issued to the same inventor or the same machine."

* * * * * * *

"In *McCreary v. Canal Co.,* 141 U.S. 467, 12 Sup. Ct. 40, it was held that where a party owned two patents, showing substantially the same improvement, the second was void; the court saying: 'It is true that the combination of the earlier patent in this case is substantially contained in the later. If it be identical with it, or only a colorable variation from it, the second patent would be void, as a patentee cannot take two patents for the same invention.' "

* * * * * * *

"The result of the foregoing and other authorities is that no patent can issue for an invention

actually covered by a former patent, especially to the same patentee, although the terms of the claims may differ; * * *"

* * * * * * *

"* * * it must distinctly appear that the invention covered by the later patent was a separate invention, distinctly different and independent from that covered by the first patent; in other words, it must be something substantially different from that comprehended in the first patent. It must consist in something more than a mere distinction of the breadth or scope of the claims of each patent."

Under this standard, as announced by the Supreme Court, it is conclusive that the appellant in the instant case is guilty of double patenting. Additionally is this fact found by the District Court without error, because appellant's own witness, one of the patentees of the patents in suit, testified that the only difference between the devices disclosed in the two patents was the elimination in the later patent No. 2,424,285 of a control valve. This testimony was adduced in answer to questions put to the witness by the Court at R. 462, where the appellant's witness Armstrong stated:

"Q. Exhibit 3 cannot be operated without a mechanical device?

A. From this discharge, yes, your Honor. This discharge does not require a mechanical device.

Q. You said that the main difference in the teaching of Exhibit 4 was that it eliminated the

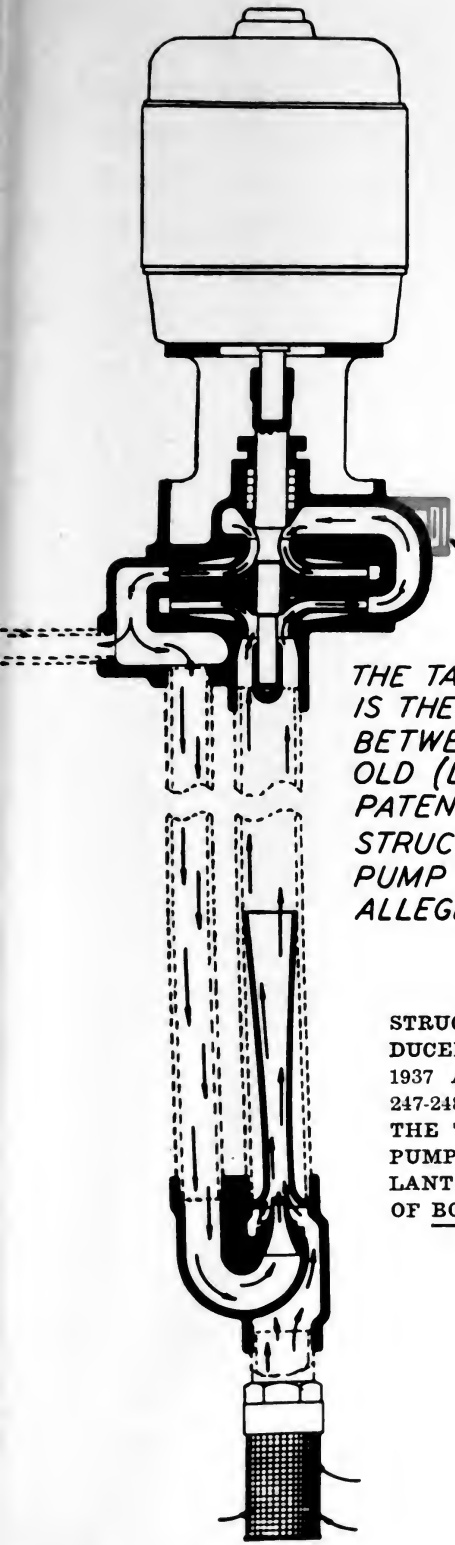
mechanical device; it saves on the time of adjustment, the people going out there to look at it?
A. That is right."

Therefore, the only difference between the two systems of the two patents is that in one a control valve is eliminated. This is a distinction without a difference because the trial Court found as a fact (Finding 7, R. 78):

"The absence of control valves in the patented system is unimportant because merely removing the control valves accomplishes nothing in itself."

This amply demonstrates that the alleged invention covered by the later patent No. 2,424,285 is not substantially different or distinct from the invention covered by the earlier issued patent, and under the rule of the *Eagle Manufacturing Co.* case heretofore cited, the later issued or second patent No. 2,424,285 is invalid as unlawfully extending the patent monopoly beyond seventeen years, as provided by statute, to twenty years.

That the claims of the two patents in suit *in fact* cover the *same alleged invention* is clear from appellant's own contention that the simple change in appellees' own prior art pump (1937—(R. 247-248) not charged to infringe as it precedes by many years the patents in suit) *infringes both patents in suit.* This change is graphically illustrated on the illustration opposite this page. Isn't it manifestly clear that if the *claims of both patents* in suit include this simple change in appellees' pump, that both patents cover



THE TAPPED OPENING IN RED IS THE ONLY DIFFERENCE BETWEEN DEFENDANTS OLD (LONG PRIOR TO PATENTS IN SUIT) PUMP STRUCTURE AND THE PUMP STRUCTURES HERE ALLEGED TO INFRINGE

STRUCTURE SHOWN IN BLACK IS REPRODUCED FROM DEFENDANTS' EXHIBIT I 1937 APPELLEES' PRIOR ART PUMP (R. 247-248). BY THE SIMPLE ADDITION OF THE TAPPED OPENING (RED) THIS OLD PUMP IS CONVERTED INTO WHAT APPELLANT CONTENDS INFRINGES THE CLAIMS OF BOTH PATENTS IN SUIT.

the *exact same alleged invention?* Just how appellant can contend that the claims of both patents cover such a simple thing and still cover separate and distinct inventions is beyond our comprehension.

Therefore, the evidence is conclusively clear that double patenting exists and that there was no error on the part of the District Court in its finding of fact. Again the appellant has not specified in its brief or argued therein that the Court erred in so finding, and, therefore, such finding should not be disturbed.

In this instance it is again true that the appellant recognized that the finding above quoted constituted a finding of invalidity of patent No. 2,344,958 on the grounds of double patenting because in its statement of points on appeal (R. 491) it included the following point:

> "12. In finding that Claim No. 13 of said patent No. 2,424,285 in substance is identical with those claims in said patent No. 2,344,958 which do not specify that the discharge opening is valve free;"

Not having specified or argued in its brief that there is any error in such finding, appellant waived such error and the finding should stand unmolested on the basis of the authorities quoted and cited on pages 67-68 of this brief.

Again we urge that appellant has attempted to show error in only certain of the independent grounds relied upon by the trial Court to show invalidity not connected with this defense. Thus, this defense

is a valid one and ample by itself to support the District Court's final conclusion that patent No. 2,424,285 is invalid, rendering the remainder of the contentions of error of appellant on appeal moot.

THERE IS NO CONFLICT IN THE FACTS FOUND BY THE TRIAL COURT.

The appellant in its brief attempts, by a play on words, to show conflicting findings by the trial Court. This can only be done by giving certain statements of the trial Court in its opinion a strained interpretation. Likewise, appellant insists throughout its brief in comparing details of construction of their pumping system as actually drawn in the patent with the Court's findings of fact and conclusions, rather than *the definitions of alleged invention as contained in the claims in the patents.*

In attempting to find conflict in the statement of facts appellant, on page 42 of its brief, says:

> "* * * the District Court found:
>
> " 'Multi-pressure contrifugal pumps of the type just described are old in the art. But of the specific models brought to the Court's attention, *none were designed specifically to supply water at different pressures simultaneously.'* (R. 58)".

From this statement appellant attacks the findings of fact of the Court that these pumps could be substituted in any old system to accomplish the results

of the patents without invention. The fact that none of these pumps were designed specifically for that purpose is unimportant because the record and the Court's findings of fact are that without changing the construction or mode of operation of those pumps, they can be so inserted in such systems by merely connecting the injector to the high pressure discharge and the discharge for service to a lower stage of the pump.

The fact that such a system would be inherently stable and self-balancing is obvious from the testimony discussed elsewhere in this brief, because the fact that the pumps are horizontal, renders them inherently stable and inherently self-balancing because the eye of the last impeller is always maintained submerged and will not be starved of water. As a matter of fact, if appellant complains that this is a difference of the prior patent, then the same difference exists between the accused pumps because they obtain inherent stability and self-balancing by precisely the same medium as shown in the record by the findings of fact of the Court (see Findings 10 and 11).* (R. 79 and 80.)

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*"10. In the defendants' accused pumping system the force of gravity accomplishes the division of water between the low-pressure discharge outlet and the next succeeding impeller by arrangement of the eye of the said impeller at an elevation lower than the low-pressure discharge opening so that such impeller eye is always submerged and is fully supplied before water can flow through the low-pressure discharge opening.

"11. That defendants' accused pumping system does not employ the means of the patents in suit of positively dividing the water between a discharge opening tapping an impeller stage and the eye of the succeeding impeller, but instead arranges the eye

THE COURT SHOULD NOT BE MISLED BY APPELLANT'S ARGUMENT THAT APPELLEES' OBTAINING A PATENT ON THE PRECISE CONSTRUCTION OF THEIR CENTRIFUGAL PUMP IS A BASIS FOR INFERENCE THAT THE PATENTS IN SUIT ARE VALID OR EMBODY INVENTIONS.

Appellant attempts to bolster the patents in suit by the following misleading statement in its brief, page 57, as follows:

> "If the inventions lacked novelty, as the defendants now contend, why did they seek letters patent thereon and why engage in an expensive interference proceeding;"

This statement is misleading and is not based on the record facts and, consequently, the inferences attempted to be drawn are without support. That statement is erroneous and misleading in the following particulars:

a. All of the claims of the Rhoda patent (a copy attached to Exhibit E—the file wrapper) (R. 536) include the particular low pressure chamber and pump details by means of which air separation is effected. Therefore, these claims, all except one (which was ultimately in interference and disclaimed by appellees) clearly are limited to the precise location and formation of appellees' low pressure pump chamber

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of the impeller to be fed at a lower elevation than the discharge opening so that the force of gravity will keep the eye of the impeller submerged although water is discharging through the discharge opening, which use of the force of gravity for the same purpose was old and well known long prior to the patents in suit and is inherent in the pumps of prior art patents Nos. 730,842, 1,494,595 and 260,417, Defendants' Exhibits Nos. P, R, and N."

by which air elimination is effected, and, consequently, are not in conflict with the structures shown in the patents in suit.

b. But one of the claims of the patent (which was very ambiguous and which the Patent Office ultimately held could also be read on the patents in suit) was the single issue of the interference which was declared by the Patent Office after *ex parte* urging by the appellant.

c. *Appellees did not engage in expensive or any interference* (contrary to the above statement of appellant) with the appellant. The file wrapper of such interference proceeding, Exhibit D, shows the following facts:

1. The Patent Office, after *ex parte* urging by the appellant, declared the interference between one claim of appellees' issued Rhoda patent and one of the applications for the patents in suit.

2. Promptly after such declaration of the interference, appellees, through their patent attorney by motions, attempted to have the interference dissolved and dismissed on the grounds that the claim in issue, while it read on appellees' structure, distinguished from the pump system disclosed in the appellant's patent in suit *because of the inclusion of the air elimination low pressure chamber above referred to,* which appellant's device does not have. An additional ground of the motion was that when interpreted to read on appellant's pump, the claim also read upon the Veronesi 1927 patent (Exhibit N here) which was not cited

in connection with the Rhoda application but located by appellees after the interference. In this motion appellees urged the Patent Office that the issue was unpatentable (when interpreted in the manner it was interpreted by the Patent Office) because it was completely anticipated by said Veronesi patent and was invalid and void. The patent attorney making such a motion was apparently unaware of the rule that the Patent Office has no power to hold a claim of a patent invalid and to dismiss an interference because the claim in issue is met by prior art.*

3. The appellees refused to engage in the interference and upon final adverse decision by the Patent Office as to the motions on the above grounds, completely disclaimed the single claim in issue from its patent because there was no reason to engage in any controversial interference proceeding respecting the alleged first inventorship of an invalid claim. The disclaimer appears in the file wrapper of the Rhoda patent at the end thereof which file wrapper is Exhibit D. Naturally, the interference proceeding in its entirety ceased with the filing of the disclaimer.

The above facts conclusively show, therefore, that the statement above quoted from appellant's brief that appellees *engaged in expensive interference over a void patent* is entirely without basis. Far from being

*In an interference involving a patent and an application, neither party is permitted to raise the question of patentability of a claim by a motion to dissolve. *Bellows v. King*, 1903 C.D. 328; *Sachs v. Ball*, 1927 C.D. 30; *Conradson v. Drake et al. v. Morgan*, 1927 C.D. 32.

expensive or an interference, it was a simple proceeding submitted on memorandum only. Therefore, the inferences which appellant would like to draw from the above facts fall of their own weight. As a matter of fact, even if the appellant was correct on its facts, the inferences it draws do not follow as a matter of law in view of the following cases:

Our Supreme Court clearly so ruled in *Paramount Publix Corporation v. American Tri-Ergon Corporation,* 294 U.S. 464, 55 S. Ct. 449, at 455:

> "* * * However inconsistent this early attempt to procure a patent may be with petitioner's present contention of its invalidity for want of invention, *this Court has long recognized that such inconsistency affords no basis for an estoppel, nor precludes the court from relieving the alleged infringer and the public from the asserted monopoly when there is no invention.* * * *" (Emphasis ours.)

Also in *Haughey v. Lee et al.,* 151 U. S. 282, 285, 14 S.Ct. 331, 332, 38 L.Ed. 162, the Supreme Court held:

> "* * * Besides, the defense of want of patentable invention in a patent operates, not merely to exonerate the defendant, but to relieve the public from an asserted monopoly, and *the court cannot be prevented from so declaring by the fact that the defendant had ineffectually sought to secure the monopoly for himself.*" (Emphasis ours.)

CONCLUSION.

In conclusion we respectfully submit that the trial Court's findings to the effect:

(1) that the alleged step in advance of the pumping system disclosed in the patents in suit did not constitute invention, but involved at most the exercise of mechanical skill;

(2) that the alleged inventions of the patents in suit as defined by the claims of those patents are clearly anticipated by the prior art and are invalid;

(3) that the difference between the pumping systems disclosed in the patents in suit and prior pumping systems is merely one of degree and did not involve patentable invention;

(4) that the patents in suit do not disclose a patentable combination, but merely an old and exhausted combination of a pumping system including a centrifugal pump and a jet pump, and in that the entire combination being shown in the prior art and no novelty being found in any of the parts of such system, no invention existed therein;

(5) that the appellees' accused pumping structures follow the teachings of the prior art, and the claims of the patents in suit, if they embrace the accused pumping structures, also embrace the prior art structures and are invalid;

(6) that the claims of the patents in suit are so broad, ambiguous and indefinite that they do not comply with R.S. 4888 and are invalid;

(7) that the later issued patent No. 2,424,285 contains claims of the same scope as the claims of the earlier issued patent and thereby unlawfully extends the monopoly on the alleged inventions and is invalid;

are not clearly erroneous, are all supported by substantial evidence, and should not be disturbed on this appeal.

We respectfully submit that the judgment appealed from should be affirmed.

Dated, San Francisco, California,
October 25, 1950.

Respectfully submitted,
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No. 12,540

IN THE

United States Court of Appeals

For the Ninth Circuit

JACUZZI BROS., INCORPORATED (a Corporation),

Appellant,

vs.

BERKELEY PUMP COMPANY (a Corporation), BERKELEY PUMP COMPANY (a Partnership), and FRED A. CARPENTER, LANA L. CARPENTER, F. F. STADELHOFER, ESTELLE E. STADELHOFER, JACK L. CHAMBERS, WYNNIE T. CHAMBERS, CLEMENS W. LAUFENBERG and MARIE C. LAUFENBERG, partners associated in business under the fictitious name and style of Berkeley Pump Company,

Appellees.

REPLY BRIEF OF APPELLANT.

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Subject Index

Table of Authorities Cited

No. 12,540

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Appellant,

vs.

BERKELEY PUMP COMPANY (a Corporation), BERKELEY PUMP COMPANY (a Partnership), and FRED A. CARPENTER, LANA L. CARPENTER, F. F. STADELHOFER, ESTELLE E. STADELHOFER, JACK L. CHAMBERS, WYNNIE T. CHAMBERS, CLEMENS W. LAUFENBERG and MARIE C. LAUFENBERG, partners associated in business under the fictitious name and style of Berkeley Pump Company,

Appellees.

REPLY BRIEF OF APPELLANT.

This is necessarily a limited reply to a voluminous 83 page brief which constitutes a masterpiece of confusion and, therefore, meets and exposes only the most flagrant of the underlying fallacies thereof.

Preliminary to our specific replies, it should be borne in mind that the patents in suit deal with three different system combinations as outlined and differentiated in our opening brief (pp. 6-12). Defendants, however, make no such differentiation but employ in their brief such veiled, nebulous and confusing terminology as to make difficult, if not impossible, the separate consideration of the three system combinations of the patents in suit.

Care must also be taken not to accept as fact the positive conclusions drawn by defendants from quoted testimony which is either irrelevant or predicated upon assumptions, disregarding features of prior art structures under consideration.

DEFENDANTS' OPPOSITION TO THIS COURT'S DE NOVO CONSIDERATION OF PRIOR ART DOCUMENTS (Dft. Brief, pp. 8-11) IS IRRELEVANT.

In our opening brief (pp. 19-20) we assert and demonstrate that the conflicting findings between the Patent Office and the District Court on the same prior art warrants *de novo* consideration of such art.

The ultimate question of patentability is whether plaintiff's three system combinations meet the requirement of the Statute, 35 U.S.C. 31. The prior art documents are before this Court, they speak for themselves and their interpretation, in view of the statute, is as open to this Court as to the District Court or the Patent Office.

De novo consideration imparts, not a review of the District Court's findings but a determination "anew" of whether, under the statute, these prior art documents disclose on their face the inventions of plaintiff's patents to be old. Therefore, defendants' unsupported assertion that our position is untenable is without pertinence. Lest this portion of their brief be nude of authority, they cite certain cases which merely hold that the presumption of validity arising from the grant of a patent is weakened where pertinent prior art had not been considered by the Patent Office. These cases do not deal with the issue presented by us.

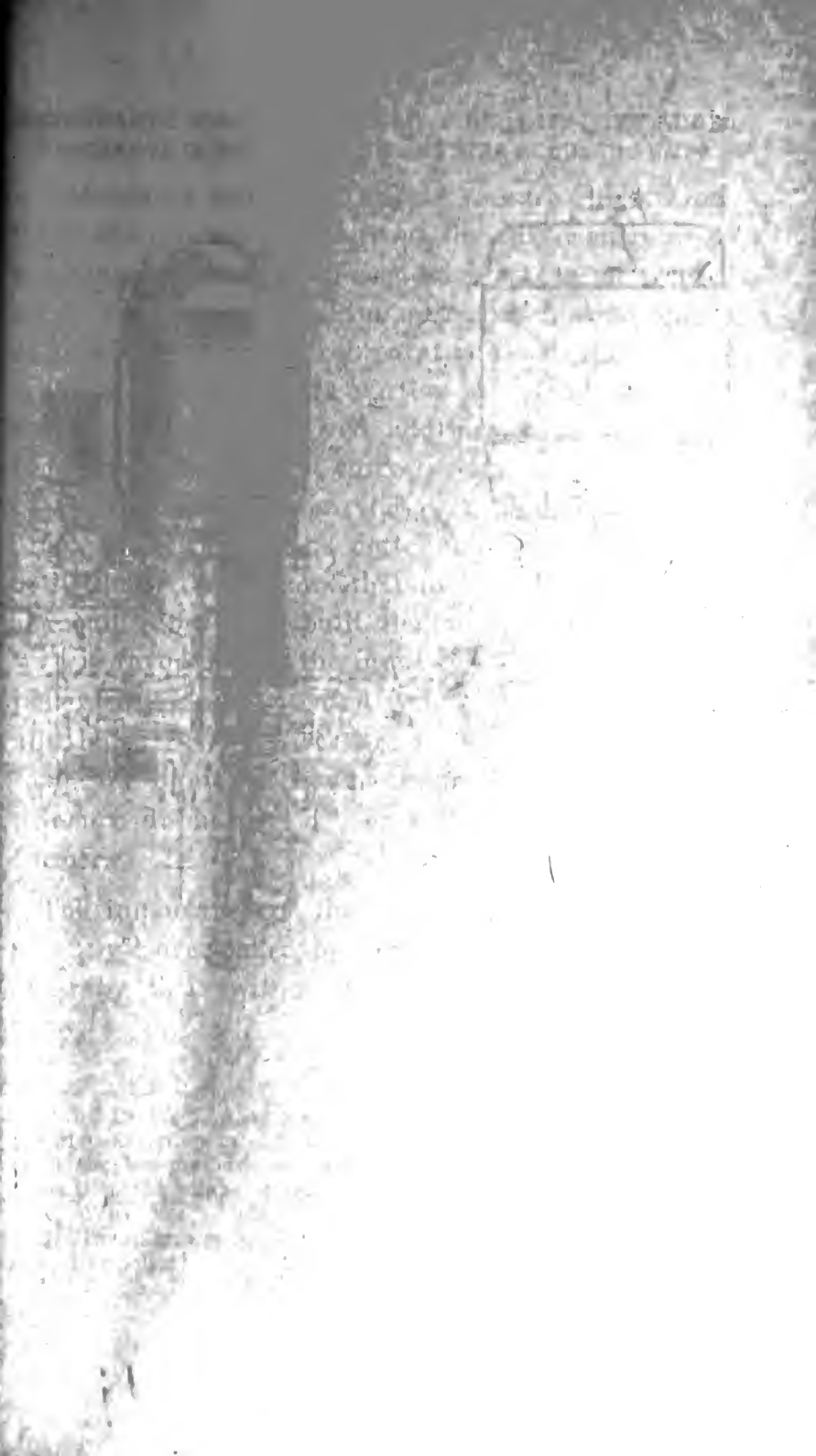
In this case the most pertinent art had been considered by the Patent Office, for those not so considered either lacked pertinence or were presumptively considered, since they add nothing to the art, being mere duplication of those features of the art which had been considered. Thus the patents to SULZER (R. 561), RATEAU (R. 564) and STEPANOFF (R. 569) are merely cumulative of the disclosures of ENSSLIN (R. 575 and HILLIARD (R. 618) which the Patent Office had considered. The patent to R. JACUZZI (R. 579) took its service discharge from the suction line and the District Court found such arrangement fraught with difficulties (Decision, R. 62). The Italian patent to VERONESI, 1913 (R. 545) and the German patent to SPECK (R. 591) supply the service line and injector from different sets of impellers in parallel and this ar-

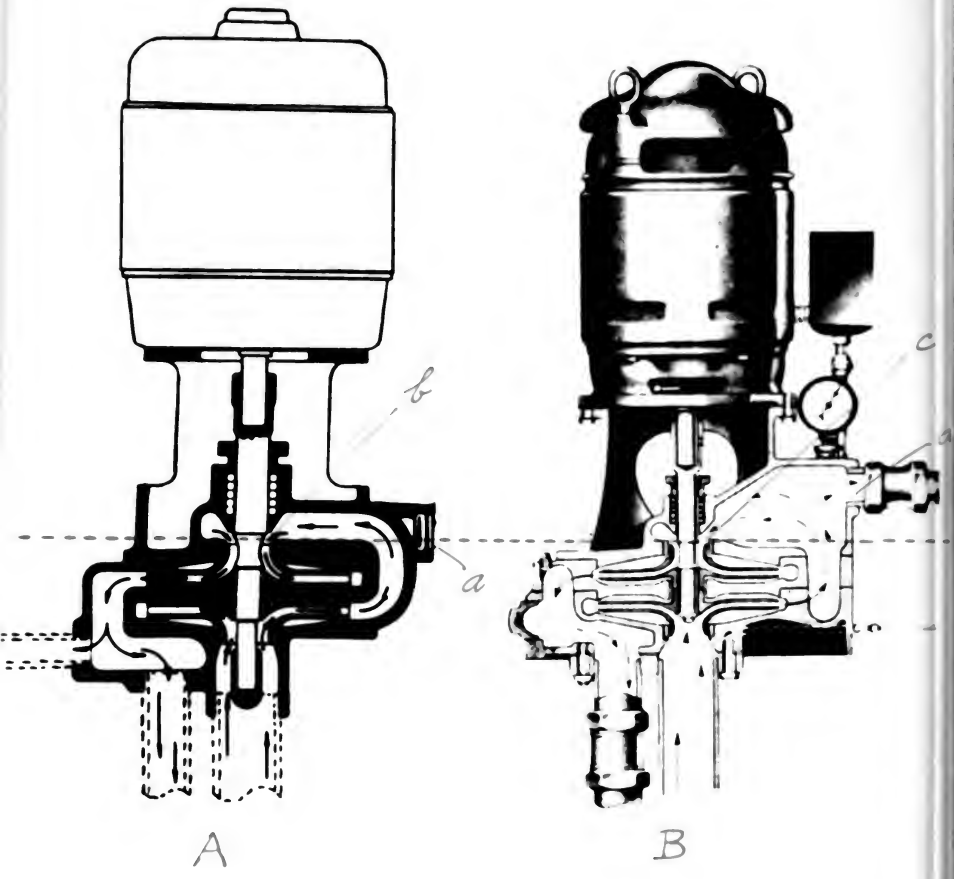
rangement the Court found was less desirable than a system where the impellers were in series (Decision, R. 62, 63). The effect of parallel arrangement of impellers is that of two separate pumps and VERONESI in his specification so designates them (Translation at R. 602).

DEFENDANTS' CONTENTION (Dft. Brief, pp. 12-16) THAT THE "PUMPS" IN ISSUE REPRESENT NO MORE THAN A NORMAL ADVANCE IN PUMP DESIGN AND A STEP BY STEP DEVELOPMENT, IS REFUTED.

Defendants' alleged historical development is created as a convenient vehicle to support erroneous conclusions, since deep well systems, as shown by the record, were in existence long prior to any lowering of the water table in California.

Plaintiff's systems are not the outgrowth of any lowering of water table. Thus plaintiff's system Combination A (Ptf. Opening Brief, pp. 8-9) solved a problem which existed in all previous deep well injector systems employing a single centrifugal pump; while system Combination B (Ptf. Opening Brief, pp. 10-11) is not even dependent upon deep well operation but functions equally well in shallow well installations which employ no injector; and system Combination C (Ptf. Opening Brief, pp. 11-12) involves an inherently stable, self-balancing system eliminating the need of troublesome control valves, which solved a problem existing from the first injector type system whether pumping from 30 feet or 600 feet.




b
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DEFENDANTS' ILLUSTRATION (Dft. Brief, p. 15) WITH ADDED DISCHARGE IS NOT THE SAME AS THEIR ACCUSED PUMPS.

Defendants state with respect to such illustration: "The red colored addition was the only change made to change it from a non-accused pump to an accused one." Such statement is a misrepresentation and is so shown to be by the comparative illustration on the opposite page wherein a portion of defendants' illustration, but with the red addition shown in black, is pictured alongside a corresponding portion of one of their accused systems (Fig. 36, Ptf. Exh. 13, R. 515). Reference to the dotted line passing through both illustrations shows that in their early pump A as modified but never built, the low pressure discharge "a" is favored over the input "b" to the upper impeller, while in the accused system B, or the one actually built, the pump casing has been redesigned to favor the input "c" to the upper stage over the low pressure discharge "d", or just the reverse of the former.

The importance of the foregoing difference, "apparently" overlooked by defendants' brief, is recognized by their witness CARPENTER in his testimony.[1]

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[1] "Q. In effect, what you do, you design to construct the casing of your pump in such a manner that the discharge to service from the low-pressure side of the pump is always at a higher point than the intake of the second impeller?

A. Why, yes.

Q. In other words, your construction is such as to favor the second impeller?

A. I guess that is as good a way to put it as any." (R 374)

DEFENDANTS' EXHIBIT A (Dft. Brief, p. 17) IS A HYBRID CREATION AND NEVER EXISTED.

Exhibit A is a hypothetical arrangement created in part upon assumptions during cross-examination of the witness JACUZZI. Defendants assert that this witness testified (Dft. Brief, p. 23) that the system of Exhibit A was built and used long prior to 1940. However, what this witness ultimately said was: "I have never seen pumps installed that way * * *" (R. 170).

DEFENDANTS' ILLUSTRATIONS (Dft. Brief, p. 18) INCLUDE MISLEADING AND ERRONEOUS NOTATIONS UPON WHICH THEIR ARGUMENTS ARE PREMISED.

Defendants' notation on said illustrations that the only difference effected by the inventions is the lowering of the discharge outlet to produce, as a result, a lower discharge pressure, apparently overlooks the fact that in both figures the discharge is taken from the third stage.

Defendants' notation under Fig. 34A that such "pump" embodies the alleged inventions of both patents in suit is incorrect, for obviously it does not embody the dual purpose pressure system of Combination B (Ptf. Opening Brief, p. 10) with its attendant advantages. The system combinations which Fig. 34A includes are inventively distinct from the prior system of Fig. 24A in providing a system wherein the internal pump structure is such as to

favor at all times the flow of water to the jet as against the discharge to service, thus providing a self-balancing and highly stable system and the elimination of a control valve; none of which features or their equivalents are found in Fig. 24A.

The disclosure of Fig. 24A is that of the F. JACUZZI patent (Dft. Exh. T, R. 584) which the Patent Office cited and found wanting as anticipatory of the inventions of each of plaintiff's patents.

HORIZONTAL MULTI-STAGE CENTRIFUGAL PUMP UNITS OF THE PRIOR ART ARE NEITHER SELF-BALANCING NOR INHERENTLY STABLE AS DEFENDANTS CONTEND.

The expression "self-balancing" is descriptive of the *cooperative relationship* existing in plaintiff's system Combination C, *between the injector and the centrifugal pump* unit, whereby the mutual reaction of the one upon the other precludes the system from stalling under adverse conditions.

Defendants' contention (Dft. Brief, pp. 28 and 29) that multi-stage centrifugal pumps, as such, are "self-balancing" is a misnomer and contrary to the testimony of their own expert FOLSOM who never did state that the alleged gravity separation in pumps such as SULZER (R. 561) and RATEAU (R. 564) makes the pumps "self-balancing" and assures full high pressure output with full opening of the low pressure discharge. In fact, his testimony is directly

to the contrary,[2] and not only confirms the patent disclosures themselves,[3] but supports the Court's finding[4] on this point.

Defendants' contention (Dft. Brief, p. 77) that such pumps can be employed *without change* in an injector system by merely connecting an injector to the high pressure discharge, is not only refuted by the factors discussed both above and in plaintiff's opening brief (pp 39-43), but defendants have offered no evidence on this point although the burden was theirs.

The danger of accepting such conjectural conclusions without proof is strikingly demonstrated by an analysis of the RATEAU pump which discloses a multi-stage centrifugal pump in which the upper stages are operatively associated with the low pressure stages through a clutch arrangement. With an injector added to the high pressure discharge end, the injector will be effectively disconnected upon declutching of the upper stages as taught by the patent. The result—*an inoperative system.*

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[2] "Q. Assuming both impellers are being driven in the Rateau patent, P, the suction enters the inlet of the first stage, is that correct?

A. That is right.

Q. And maintaining that assumption, would any fluid discharged from the first stage enter the inlet of the second stage?

A. *The amount of fluid entering the second stage depends on the condition of the control valve 37.*" (R 288-289)

[3] "In the operation of the pump when the fluid is to be lifted to its greatest height the valve 37 of the discharge-pipe 35 is closed, and the valve 38 of the pipe 36 is opened." (R 568A)

[4] "But of the specific models brought to the Court's attention, none were designed specifically to supply water at different pressures simultaneously." (R 58)

THE VERONESI 1913 ITALIAN PATENT WAS FOUND IRRELEVANT BY THE DISTRICT COURT.

Identity of mode of operation of the VERONESI 1913 Italian patent (R. 545) to either defendants' accused systems or any of plaintiff's system combinations has never been established.

The testimony of defendants' witness, Dr. FOLSOM, relied on by defendants as establishing such identity of mode of operation, proves nothing in this connection, and for two potent reasons, either of which suffices:

1. Dr. FOLSOM'S understanding of "mode of operation" was strictly limited to the increasing of pressure through the action of a centrifugal pump, and not to system combinations as here involved. He testified:

> "* * * The mode of operation, *which is an increase in pressure through the action of the centrifugal pump,* occurs in both of the centrifugal *pumps,* the difference is in the arrangement." (R. 324.)

Thus, so long as it utilizes a centrifugal pump, every water system would embody the same mode of operation. Based on this mistaken premise, defendants propound that the obviously different systems of the prior art each embody exactly the same mode of operation, and this in the face of their admission that differences in structure and arrangement exist.

Moreover, the testimony of Dr. FOLSOM relied on by defendants (Dft. Brief, pp. 37-38) clearly shows

that this witness was furthermore testifying relative to an incomplete and hypothetical system, for the VERONESI 1913 patent served merely as a basis for building a mythical system in the question propounded to Dr. FOLSOM who was careful to allow for the differences, in his answer.[5]

By analogy, if color is disregarded, it may be stated that there is no distinction between a Negro and a Caucasian.

Defendants stress (Dft. Brief, p. 37) that Dr. FOLSOM'S testimony was not contradicted and is the only testimony. Since this testimony neglects the essence of the reference, any contradiction was obviated.

2. In defendants' comparison of this Italian (1913) patent with their accused pump system (Dft. Brief, p. 40) they resort to the use of inaccurate terminology broad enough to cover different structures and arrangements. Thus, under their word breakdown of the VERONESI structure, "a multi-stage centrifugal pump" should read—a *pair* of multi-stage centrifugal pumps—(see translation of VERONESI (1913) Specification at R. 602); and the remainder of the breakdown should be corrected to

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[5] "Q. Thank you, Doctor. Now, Doctor, *disregarding the fact that the water is divided between the high pressure and the low pressure portions of the pump in the Italian patent, M,* is there any *substantial* difference in the mode of operation between the pumping system shown in that Italian patent and the mode of operation in the Berkeley pump (the accused pump) shown in Exhibit 5? (parenthesis added)

A. *Neglecting the details of the arrangement of the centrifugal pump,* the pump system is the same." (R 303)

specify that the water entering the suction line of the VERONESI 1913 pump divides before it enters any stage of either of the pair of pumps, and, further, that there is *no favoring* of the supply to the injector (an important factor in the consideration of the inventions here involved).

Thus corrected, it is manifest that, far from being the same systems, the systems compared are decidedly different, as the District Court itself found (Dec., R. 62-63):

> "In the Italian patent number 139,161 to Veronesi and the German patent number 376,684 to Speck the single service line and the injector are supplied from different sets of impellers in parallel on a single shaft. The extra number of impellers required for this arrangement should make it less desirable, however, than a system in which the pump impellers are in series."

The aforementioned adverse finding represents the sum total of the consideration given to these two irrelevant foreign patents by the District Court in its decision.

Defendants' quotation (Dft. Brief, p. 41) is not only incomplete, but a misquote (see Ptf. Opening Brief, p. 46), and reference to plaintiff's brief shows that we commented on the VERONESI 1913 patent and referred to the Court's adverse finding with respect thereto.

There is no finding by the District Court that it would not involve invention to substitute a *single*

prior art multi-stage centrifugal pump for the *pair* of *parallel connected* multi-stage pumps of the VERONESI 1913 patent, as inferred by defendants (Dft. Brief, pp. 41-42). Furthermore, Findings 12, 27 and 28, relied on by defendants in support of such contention, are wholly irrelevant and lacking in pertinence.

Defendants' contention, that *Crowell v. Baker Oil Tools,* 153 Fed. (2d) 973, is the last expression of this Court on the admissibility for purposes of anticipation of the non-noticed or pleaded VERONESI 1913 patent, overlooks the later case of *Blanchard v. J. L. Pinkerton, Inc.,* 77 Fed. Supp. 861, which was affirmed, 173 Fed. (2d) 573, by this Court upon the grounds stated in the opinion of the lower Court.

DEFENDANTS' WORD COMPARISON BETWEEN THE VERONESI 1927 PATENT AND THEIR ACCUSED PUMPS (Dft. Brief, pp. 46-47) IS UNSOUND.

Defendants' word comparison between the VERONESI 1927 patent and their accused pumps is based solely upon defendants' interpretation of the incomplete and ambiguous foreign patent drawing, and disregards and violates the teachings of the specification. Such comparison is further in error as to Paragraph "h", in that the conclusion as to self-balancing is totally unsupported by R. 305 which defendants cite. The conclusion in Paragraph "i" further finds no support in the incomplete disclosure of the VERONESI patent, since that portion of the VERONESI system,

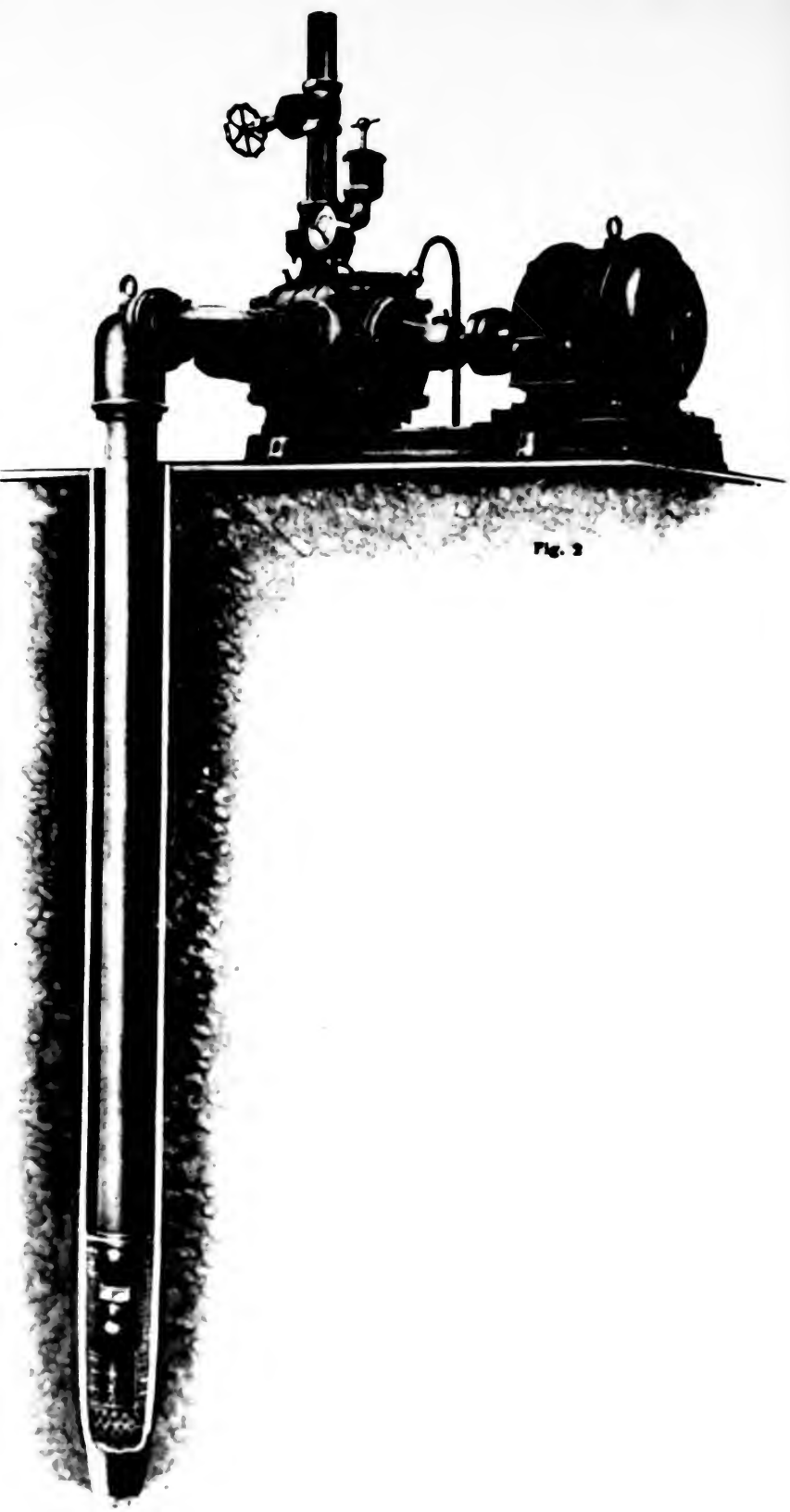

Fig. 2

namely the service line which would indicate the presence or absence of a control valve, is not even included in the disclosure. Defendants' conclusions, therefore, under both Paragraphs "h" and "i" are mere assumptions, not based on fact or supported by the record.

The danger of accepting such statements as facts is strikingly demonstrated by defendants' own Exh. AG, from which, on the opposite page, we reproduce Fig. 2 thereof. Such figure shows the VERONESI 1927 pump system *with a control valve* in the service discharge line and utterly refutes defendants' baseless assumption that said reference system is inherently self-balancing and requires no control valve.

Furthermore, the presence of a control valve in the discharge line accords with the teachings of the VERONESI 1927 specification (R. 606) which has been the conventional practice for years and is illustrated in the system involved in the prior art patent to F. JACUZZI (R. 584).

DEFENDANTS' CONTENTION THAT PLAINTIFF'S WITNESS ARMSTRONG AGREES WITH THEIR INTERPRETATION OF THE ITALIAN (1927) PATENT DRAWING IS REFUTED BY THE RECORD.

Defendants' conclusion (Dft. Brief, p. 47) that plaintiff's witness ARMSTRONG agrees with defendants' witnesses FOLSOM and LAYNE that their interpretation of the VERONESI 1927 patent draw-

ing is the logical construction, is incorrect, in that the testimony quoted and relied on relates to an *assumed* construction and not to the structure of the VERONESI 1927 patent drawing which even the District Court found (Dec., R. 63) pictures no passage. What defendants have actually done is to assume a hypothetical structure and create the impression that ARMSTRONG'S answers to the hypothetical structure apply to the actual showing of the patent drawings. What the witness ARMSTRONG said with respect to the disclosure of the VERONESI 1927 patent was that there was nothing on the drawing to indicate a flow passage to the service discharge:

> "Q. Is there anything on the drawing, Exhibit N2, which indicates to you how the water gets to discharge 9?
> A. No." (R. 465.)

THE ILLUSTRATION OPPOSITE PAGE 46 OF DEFENDANTS' BRIEF IS AN ALTERATION OF ONE VIEW OF THE VERONESI 1927 PATENT DRAWING TO SUIT DEFENDANTS' INTERPRETATION OF THE DRAWING IN UTTER DISREGARD AND VIOLATION OF THE TEACHINGS OF THE PATENT SPECIFICATION.

The title of such illustration should not be confused with the actual drawing of Exhibit N, for it constitutes a revision and alteration of only one figure thereof to suit defendants' interpretation of what they thought the patent drawing ought to mean.

Fgure 1 of the VERONESI patent drawing pictures no passageway such as noted by defendants,

nor do the dotted lines, which they have added without comment to such illustration to indicate such a passageway, appear in the original patent drawing. Defendants' witnesses could only interpret the ambiguous patent drawing, but VERONESI, the patentee, did not have to interpret—he knew—and so stated in his specification. The language of the VERONESI specification was not construed or even referred to by defendants' witnesses and, while fully discussed in plaintiff's opening brief, has not been refuted or explained by defendants in their brief. Such language is, therefore, controlling.

The fact that the service discharge in the VERONESI 1927 structure is located above the first stage and at a distance from the last stage of the pump unit is not uncommon practice for, even in the limited art of record, we have two examples of such practice—one in plaintiff's F. JACUZZI patent (R. 584) where the water is divided at the last stage, as taught by the VERONESI specification, and a portion of it is taken out at the opposite or lower end of the pump housing.

The other example is represented by the practice of defendants in their fire fighting pump (Ptf. Exh. 22, Fig. 72, R. 533) shown in section in Fig. 74 (R. 534) wherein the water from the end stage 7 is taken out of the pump housing above the second stage through the discharge flange 13 (shown in dotted lines).

By a separate three-dimensional drawing (Ptf. Exh. 21), plaintiff has illustrated how a similar prac-

tice could be obtained in the VERONESI 1927 pump structure in accordance with the teachings of his specification. This drawing has been attacked upon the ground of being deceptive in the minor particular of a line which had nothing to do with the flow passages from the last stage to the discharge. Such flow passages satisfy the teachings of the VERONESI specification and have not been refuted.

As to the minor detail of the drawing under criticism by defendants, defendants quote only selected portions of the witness ARMSTRONG'S testimony, in utter disregard of his immediately subsequent testimony nullifying the alleged discrepency and establishing, by means of an explanatory sketch (Ptf. Exh. 23), the accuracy of the drawing.[6]

THE FACTS AS FOUND BY THE TRIAL COURT AND THE FACTS SHOWN BY THE RECORD, AS RELIED ON BY DEFENDANTS, FAIL TO SUPPORT THEIR CONTENTIONS (Dft. Brief, pp. 52-56) THAT PLAINTIFF'S INVENTIONS ARE FOR OLD COMBINATIONS.

To intelligently discuss any issues relating to the inventions of plaintiff's patents, the three system Combinations A, B and C (Ptf. Opening Brief, pp.

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[6] "Q. You actually show a line at the bottom of that boss which you said they contact?

A. Well, it would show a line.

Q. So you would have to add not only the ordinary thickness of half the boss, but you have to then add another wall, don't you?

A. No, I didn't add any other wall. I am telling you that is a shade line to show you that is round and also to show this passage which comes from the annular end." (R 474)

8-16) must be considered as separate and different inventions and they cannot be merged into a single invention by the indiscriminate use of all-embracing and vague terminology such as "pump", "step", "combination" and the like.

Defendants' arguments for this reason are vague and uncertain and their conclusions unsound. Also contributing to the confusion is the error of the District Court's Findings 24 and 25 (R. 85) in looking to the claims of a patent for an expression of the intent and purposes of the inventions involved, and many errors of defendants' argument lie in adopting the Court's error as their premise.

It is fundamental in the drafting of patent applications to particularly recite the objects and purposes of the invention. This should not be confused with the claims which measure the scope of the invention and merely recite the structure for carrying such objects and purposes into practice.

Walker on Patents, Deller's Ed., Vol. II, page 710;

Patentability and Validity, Rivise & Caesar, Sec. 185, page 345.

The objects of the system combinations of patent 285 are set forth in the lower half of column 1, page 1 of such patent (R. 499), and of patent 958, in the top half of column 2, page 1 thereof (R. 506).

Defendants' reliance (Dft. Brief, p. 53) on the District Court's Finding 16 (R. 82) to anticipate all of plaintiff's system combinations, is not supported

by such finding which says nothing regarding the relevancy of the VERONESI (1913) patent to any of plaintiff's combinations. In fact, defendants admit (Dft. Brief, p. 53) the lack of relevancy of the VERONESI (1913) patent in stating it discloses the complete "combination" of plaintiff's two patents as claimed, *except* for the fact that the impellers are in parallel rather than in series. Thus, what defendants actually contend discloses the combination is not the system of the VERONESI (1913) patent, but some hypothetical unknown, obtained by disregarding the very features which characterize the reference system.

Defendants' reliance (Dft. Brief, p. 54) on the District Court's Finding 17 (R. 82) to establish relevancy of the SPECK (German) patent (R. 591) to plaintiff's system Combinations A, B and C, fails for like reason, for Finding 17 has nothing to say regarding any of plaintiff's patented system combinations. In fact, the District Court found that the very structure which defendants and their expert FOLSOM disregarded is that which led the Court to remove these foreign patents from further consideration.[7]

Defendants further rely (Dft. Brief, p. 55) on the District Court's Finding 46 (R. 91) as holding all of

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[7] "In the Italian patent number 139,161 to Veronesi and the German patent number 376,684 to Speck the single service line and the injector are supplied from different sets of impellers in parallel on a single shaft. *The extra number of impellers required for this arrangement should make it less desirable, however, than a system in which the pump impellers are in series.*" (Dec., R 62-63)

plaintiff's patented system combinations anticipated by the two parallel disposed pumps of the VERONESI (1913) patent, or the equivalent thereof of the SPECK (German) patent. This further attempt to parade these two foreign patents as disclosures of the various system combinations of plaintiff's patents must also fail, in that Finding 46 does not even mention these foreign patents.

DEFENDANTS' CONTENTION (Dft. Brief. p. 57) THAT THE DISTRICT COURT'S FINDINGS 41 AND 42 ARE FINDINGS OF INVALIDITY BECAUSE THE CLAIMS ARE FUNCTIONAL, AMBIGUOUS AND INDEFINITE UNDER R. S. 4888, IS ERRONEOUS.

There exists no basis in the record to support defendants' contention that the claims of plaintiff's patents are either functional, ambiguous or indefinite, nor did the District Court so state in its findings. Findings 41 and 42 embody no such language, whereas the District Court's reference therein to structure is a clear designation that the findings relate to the scope of the claims.

R. S. 4888 imposes no limitation or restrictions as to scope of claims, this being determined in the light of the prior art. Thus, as stated by *Walker on Patents,* Deller's Ed., Vol. II, page 770:

> "The claims are the creature of statute in which the inventor is required to particularly point out and distinctly claim his invention. (White v. Dunbar, 119 U.S. 47, 51.) It is in the

claims therefore that the inventor secures his protection, and such claims should therefore be drawn with great care and *as broad as possible, consistent with the state of the art.*"

And again on page 1245:

"* * * a claim is not required to be limited to exact device disclosed by specification and drawings, since the claims of patent and not its specifications measure the invention."

Defendants apparently overlook the fact that plaintiff in its opening brief (pp. 44-45) specifically argues Findings 41 and 42.

CONTRARY TO DEFENDANTS' CONTENTION OF DOUBLE PATENTING, THE DISTRICT COURT FOUND A LINE OF DIVISION EXISTED BETWEEN THE CLAIMS OF THE TWO PATENTS IN SUIT, AND THE RECORD FULLY ESTABLISHES THE ERROR OF DEFENDANTS' CONTENTION.

The defendants (Dft. Brief, p. 69) isolate and consider the latter part of the District Court's Finding No. 6, and disregard the preceding part thereof which gives meaning to the finding as a whole. Thus the part *ignored* by defendants in arriving at their conclusion of double patenting is italicized as follows:

"6. *The claims of the two patents in suit fail to express clearly the line of division between them, and one must resort to the specifications to determine it;* for example, claim 13 of patent No. 2,424,285 in substance is identical with those claims in patent No. 2,344,958 which do not

specify that the discharge opening to service is valve free."

The defendants in their analysis of Claim 13 of patent 285 with Claim 5 of patent 958, acknowledged (Dft. Brief, p. 71) certain differences to exist, which differences the Patent Office had recognized among other things as determining the line of division between the inventions of the two patents in suit.

Defendants have apparently overlooked the discussion in plaintiff's opening brief of the history of the patents in suit, which establishes the non-existence of double patenting as well as the obvious error of the finding as misconstrued by defendants. As we have pointed out in our opening brief, pages 7-8, the applications of the two patents were *co-pending;* that patent 958 is a *continuation-in-part* of patent 285; that the Patent Office required and the patentees maintained a *line of division* between the claims of the two patents; that while simultaneous issuance of the patents was requested, the allowance of the application of patent 285 was *un*avoidably delayed beyond the grant of patent 958 because of the Interference between the application of patent 285 and defendants' RHODA patent. Thus the issue of double patenting had been thoroughly considered and settled by the Patent Office, and the subsequent issuance of the patents is a finding that the claims of such patents are not for the same invention.

The question of determining when improvements should be embraced in a number of patents presents

a difficult problem and should be left to the Patent Office.[8]

Since the claims of the two patents are admittedly different, it makes no difference in which of the two co-pending applications the generic claims appear and such claims may issue last as they did in patent 285, since generic claims were first to appear in such patent before the issuance of patent 958.[9]

Defendants surprisingly announce in effect (Dft. Brief, pp. 74, 75) that it is beyond their comprehension how their accused systems could infringe both patents in suit unless such patents cover exactly the same invention. Defendants apparently overlook the established law in this respect as set forth by *Walker on Patents,* Deller's Ed., Vol. III, page 1692:

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[8] ". . . *However, and even though the applicant may appeal from a ruling of the Patent Office, he cannot 'justly be blamed for acquiescing in a command by lawful authority, much less can he properly be made to suffer loss by obedience.'* American Laundry Machinery Co. v. Prosperity Co. (C.C.A.) 295 F. 819, 821. *Furthermore, as was said in that case: 'It being "difficult, perhaps impossible," to lay down general rules determining when improvements should be embraced in "one, two or more" patents, discretion must be left to the Patent Office on this "nice and perplexing question."'"*

National Tube Co. v. Steel & Tubes, 90 F. (2d) 52, 54 (CCA 3, 1937).

[9] "When a patent has issued, no subsequent claim by the patentee can be valid for the same invention; *but if the claims be different, and the applications are pending concurrently, it makes no difference in which of the two applications the broader claims appear, and the generic claims may issue last, unless they were for the first time introduced into the application after the first patent issued.* (Kaplan v. Robertson, 50 F. (2d) 617, 621, D.C. Md. (1931).)"

Walker on Patents, Deller's Ed., Vol. II, page 771.

"A device which embodies the principles of a basic patent as well as one for an improvement infringes both." (Citing cases.)

See, also:

Patentability and Validity, Rivise & Caesar, Sec. 321, page 604.

THE INTERFERENCE INVOLVING PLAINTIFF'S PATENT 285 AND DEFENDANTS' RHODA PATENT STRENGTHENS THE ORDINARY PRESUMPTION OF VALIDITY OF PLAINTIFF'S SAID PATENT.

The voluminous file wrapper of over 150 pages of the Interference (Dft. Exh. D) is a forceful contradiction of defendants' assertion that "appellees did not engage in expensive or any interference." Furthermore, defendants thought enough of the invention involved in Claim 11 of plaintiff's patent 285 to draft said claim and secure its issuance in their own RHODA patent. It is significant that notwithstanding the extensive urging of invalidity of the invention of Claim 11 by defendants in the Interference, the Patent Office continued to recognize the irrelevancy of the VERONESI (1927), SCHMID and HILLIARD references by passing plaintiff's patent 285 to issue.

Defendants apparently overlook the fact that this Interference and the subsequent action of the Patent Office, together with their own prior conduct and admissions, serve to materially strengthen the ordinary

presumption of validity of plaintiff's patent 285. The question of estoppel is not involved and defendants' citations thereon are without pertinence.

CONCLUSION.

We respectfully urge that the judgment of the District Court be reversed and judgment be ordered for plaintiff as prayed for in its complaint.

Dated, Berkeley, California,
November 9, 1950.

Respectfully submitted,
CHARLES O. BRUCE,
NATHAN G. GRAY,
Attorneys for Appellant.

EDWARD BROSLER,
Of Counsel.

No. 12,540

IN THE

United States Court of Appeals

For the Ninth Circuit

JACUZZI BROS., INCORPORATED (a corporation),

Appellant and Petitioner,

vs.

BERKELEY PUMP COMPANY (a corporation), BERKELEY PUMP COMPANY (a partnership), and FRED A. CARPENTER, LANA L. CARPENTER, F. F. STADELHOFER, ESTELLE E. STADELHOFER, JACK L. CHAMBERS, WYNNIE T. CHAMBERS, CLEMENS W. LAUFENBERG and MARIE C. LAUFENBERG, partners associated in business under the fictitious name and style of Berkeley Pump Company,

Appellees and Respondents.

APPELLANT'S PETITION FOR A REHEARING.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO,

Subject Index

Table of Authorities Cited

No. 12,540

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Appellees and Respondents.

APPELLANT'S PETITION FOR A REHEARING.

To the Honorable William Denman, Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

Petitioner, on the grounds following, petitions for rehearing of the judgment of this Court holding all the claims of petitioner's patents invalid for lack of invention.

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1. **FACT FINDINGS MISREAD OR ERRONEOUSLY PREMISED.**

(a) The affirmance of the judgment of the Trial Court clearly shows that this Court adopted the unsupported and erroneous assumption of the Trial Court that mere submergence of gravity of the upper stage impeller was all that was necessary to make prior art multi-discharge centrifugal pump units function successfully with attached injector assemblies and produce the system combinations of petitioner's patents.

Such conclusion is based solely upon an inference gratuitously drawn, since no testimony was offered by respondents to establish that mere submergence of the impellers in the Trial Court's hypothetical assembly (Findings 27, 28 and 46, R. 86, 91) would in and of itself assure the operativeness of such assembly. The burden of proof rested squarely upon respondents to establish the operability of such a system beyond a reasonable doubt. This they failed to do to any degree.

Such assumption ignores the obvious structural differences existent in respondents' pump unit over

prior art centrifugal pump units, which differences constitute decisive factors in determining the critical and necessary favoring of the upper stage impeller over the low pressure service discharge in the division of water between them, as well as maintaining the necessary minimum volume and pressure requirements of the injector. The error of such assumption lies in misreading or disregarding those findings of the Trial Court which definitely establish the prior art centrifugal pump units to be subject to failure if low pressure service discharge is attempted in combination with an injector assembly, despite the existence of gravity separation in such pump units. In this respect, what the Trial Court actually said was:

> ". . . special difficulties are presented in supplying a multi-pressure discharge from a centrifugal pump with an injector assembly attached. The injector assembly requires a certain minimum volume and pressure of water for continued operation. Therefore if too much of the water is permitted to flow from a discharge opening tapping one of the earlier impeller stages of the pump unit, insufficient water will pass through the pump to supply the injector assembly." (R. 60, 61.)

> "Multi-pressure centrifugal pumps of the type just described are old in the art, but of the specific models brought to the Court's attention, none were designed specifically to supply water at different pressures simultaneously. The discharge openings tapping the various impeller stages were equipped with control valves with the intention that only one would be open at a time." (R. 58, 59.)

". . . If the control valve at this discharge opening were open too wide in relation to the volume of water being sucked into the pump, all of the water would flow out this discharge and none of it would pass on through the upper impellers to the high-pressure discharge." (R. 59.)

Ample evidence supports these findings of the Trial Court. Thus, respondents' own expert stated as to a representative prior art multi-discharge centrifugal pump:

"A. The amount of fluid entering the second stage depends on the position of the control valve 37." (R. 289.)

The ultimate assumption of the Trial Court that an injector assembly may be combined with the multi-discharge centrifugal pump units of the prior art, still less without invention, to duplicate petitioner's system combinations, is therefore not only unsupported by the proofs, but, on its face, is illogical as being contrary to its own findings of fact.

(b) This Court erroneously assumed with respect to system B (Claims 17 and 18 of Patent 2,424,285) that:

"No functional change was discovered." (Opinion, p. 8.)

Such assumption is directly contrary to the proofs including the admissions of respondents in their literature. This system contributes the new and unobvious functions never before attained of providing in an assembly involving a single pump unit, either

a high-pressure low-volume discharge suitable for household requirements, or low-pressure high-volume discharge suitable for irrigation, or both types of discharge simultaneously, and of providing a dual purpose system with automatic starting at either the low or high pressure discharge lines.

For the first time in pump history has a conventional pressure tank and associated pressure switch, adjusted to one pressure, been made to control automatic starting at two widely different pressure points in the system, to-wit: the high pressure discharge point and the low pressure discharge point. This feature is difficult to understand because it is not obvious and such is evidenced by the doubts raised by the Patent Office experts during prosecution, as to how the prevailing automatic starting switch and pressure tank, adjusted to the high pressure point of the system, can automatically control starting at the low pressure point of the system. (Respondents' Exh. C, pp. 66, 67, 75, 76, 77, 88, 89, 90 thereof.)

If this Court, in concluding that no functional change was discovered in system B, had in mind the basic functions of each element in the system, then its conclusion is unsupported in law, for, in a combination, the new functions looked for are not the basic functions of the individual elements for they do not change. It is the overall functions of the combination as a distinct entity which the law considers, and such functions are measured by the new and improved results obtained by that entity as distinct from the basic function of each part.

Further, predicated on petitioner's assertion that prior art patents or publications must bear adequate teachings for the systems sought to be invalidated, this Court erroneously concludes:

> "But where the accused device could be made by a competent mechanic by following suggestions . . ., such a doctrine is inapplicable." (Opinion, p. 10.)

Such a conclusion does not constitute the test of invention, and primarily because it ignores the factor known as *conception*.

The vice of such a conclusion lies in the assumption that a mere mechanic would possess that flash of ingenuity which would disclose to him what he was to attain and how. If the conception be furnished from the patents in suit or by the flash of inspiration of another who told the mechanic what to do, then it is conceded that a mechanic could effect the combinations. But the patent law, however, does not sanction the invalidating of patents by *ex post facto* wisdom, since knowledge after the event is easy and problems once solved present no difficulty.

(c) This Court erroneously assumes that:

> "Consideration of those devices already in the public domain indicates that in the patents in suit there was at highest a movement of situs of the low pressure discharge from the suction line of an old pump to the second stage or from one impeller stage to another." (Opinion, p. 7.)

The error of this assumption is clearly and unmistakenly confirmed by the fact that respondents

tried to justify shifting, on paper, the suction line discharge in their early system (Respondents' Exh. J, R. 544) to a stage of the pump unit thereof, and they were compelled to admit such a shift rendered the system *in*operative (R. 374).

When a low pressure discharge is taken from the pump unit, the pressure and volume characteristics of the whole system are radically changed. Respondents could not produce these characteristics until they had redesigned and reconstructed their pump unit casing to assure favoring of the second stage over the low pressure discharge. They had to create a radically new pump unit.

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2. ERRONEOUS RULES APPLIED.

(a) This Court has applied an erroneous rule relating to the construction of Claim 11 of petitioner's patent 2,424,285 in adopting the conclusion of the trial Court, thus:

> "Claim 11 of 2,424,285, said by appellant also to be germane to System A, was found by the Trial Court to relate to a two-pump system." (Opinion, p. 7.)

To construe Claim 11 as relating to a two-pump system involves questions of construction which are questions of law. (*Coupe v. Royer,* 155 U.S. 565, 574-75.)

The claims of a patent are to be construed in the light of the specification. (*Carnegie Steel Co. v. Cam-*

bria Iron Company, 185 U.S. 403, 432, 79 L. Ed. 968.) This is the established rule of law and has heretofore been followed by this Court. (*Schnitzer v. Calif. Corrugated Culvert Co.,* 140 F. (2d) 275, 276.)

This Court has, in its construction of Claim 11, expanded the scope thereof to relate to two pumps, whereas the patentees in the light of their specification were using the words "high pressure pump" and "low pressure pump" to mean impeller stages of a single pump unit. While the term "pump" instead of "stage" is somewhat inept, such language was that chosen by respondents themselves to mean stages in their *Rhoda* Patent 2,315,656 (R. 536) and to cover the accused structures which involve a single pump unit with plural stages. This claim was copied verbatim from the *Rhoda* patent and awarded to the patentees of petitioner's patent as the result of an interference.

As construed in the light of the patent specification, Claim 11 is limited and restricted in meaning to a system involving a single pump unit with plural stages and, as such, the system is not exemplified in the prior art.

This Court further erroneously assumed that:

> "It is our opinion, that for functional purposes in comparison of the systems of plaintiff with devices in the public domain, inclusion of two pumps or one pump is immaterial, since these are equivalent in such a system." (Opinion, p. 7.)

The Trial Court, however, found to the contrary:

> "There is a significant difference between systems employing only one pump and those employing two." (R. 73.)

The soundness of this finding of the Trial Court is established by the fact that any attempt to combine into one pump unit, the two pump units of the *Schmid* British patent (R. 595), considered by the Trial Court to negative invention of Claim 11, would necessitate eliminating the large storage tank and this would change the entire character and function of the system.

(b) This Court has further applied another rule in contravention of that uniformly recognized by the Courts and heretofore followed by this Court, in saying, after enumerating the various elements of petitioner's system:

> "These elements, when placed in aggregation, did not functionally operate differently than before." (Opinion, p. 10.)

and

> " . . . there is no invention in placing together devices well known in the art, however novel and useful may be the results, unless a functional difference from all previous known constructions be achieved." (Opinion, p. 10.)

If this new rule were to be followed, then there could never be invention in combinations, for the basic functions of individual components never change.

The well-recognized rule, however, is that where the conjunction or concert of elements contributes some new or improved result which exceeds the sum of its individual parts, the combination is patentable. (*Webster Loom Co. v. Higgins,* 105 U.S. 580, 591, 592, 26 L. Ed. 1177.)

This Court has heretofore followed this uniform rule. (*Wire Tie Machine Co. v. Pacific Box Corporation, Ltd.,* 102 F. (2d) 543, 552; *Bianchi v. Barili,* 168 F. (2d) 793, 798.)

The question of which rule to apply in this case involves a question of law.

Whether petitioner's system constitutes combinations or aggregations is not to be tested by the functions of the individual components isolated from the system, for, basically, a pump always functions as a pump, and an injector assembly functions as such; but rather by their cooperative functions in the system combinations.

As illustrative, petitioner's pump unit never changes its basic function of acting as a pump, but in petitioner's systems, it takes on the added function, for example, of supplying the necessary volume of water at the required high pressures to maintain the injector assembly, and therefore the system, operative, *while* discharging to service in large volume and at low pressure.

The effect of such components in the aggregate, in determining pressures and volumes of liquid at such points within the systems as to give thereto new

characteristics, cannot be brushed aside. The graphs appearing in the patent drawings of petitioner's patents visually illustrate the new pressure-volume characteristics of petitioner's systems, which characteristics are not found in the prior art systems. The *un*controverted evidence of the new and improved functions of petitioner's systems A, B and C, due to such new and different system characteristics, are summarized in petitioner's briefs and acknowledged and praised in respondents' literature.

This Court's new ruling as to construction of claims and as to the test of a combination, being so out of line and incompatible with the well-recognized law on the subjects, are likely to plague it and the patent law in cases to come.

The probability that the judgment of invalidity of petitioner's patents for lack of invention has been affirmed under misapprehension is so great that this Court should grant a rehearing on that issue.

Dated, Berkeley, California,
August 20, 1951.

Respectfully submitted,
CHARLES O. BRUCE,
NATHAN G. GRAY,
Attorneys for Appellant and Petitioner.

EDWARD BROSLER,
Of Counsel.

CERTIFICATE OF COUNSEL.

The foregoing Petition for Rehearing is believed to be meritorious and is presented in good faith and not for delay.

Dated, Berkeley, California,
August 20, 1951.

CHARLES O. BRUCE,
NATHAN G. GRAY,
Attorneys for Appellant and Petitioner.

No. 12,543

IN THE

United States Court of Appeals

For the Ninth Circuit

HERMAN H. ROSS,
Appellant,

vs.

THE BRITISH YUKON NAVIGATION COMPANY, LTD. (a Corporation),
Appellee.

(CONSOLIDATED)

MARTHA CORNELIA ROSS,
Appellant,

vs.

THE BRITISH YUKON NAVIGATION COMPANY, LTD. (a Corporation),
Appellee.

BRIEF FOR APPELLEE.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Statutes

Texts

Rules

No. 12,543

IN THE

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THE BRITISH YUKON NAVIGATION COMPANY, LTD. (a Corporation),
Appellee.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

The appellee concurs in the Jurisdictional Statement contained in Appellants' Opening Brief.

STATEMENT OF THE CASE.

The present appeal arises out of a collision which occurred on January 29, 1949 near Milepost 786, Alcan Highway, Yukon Territory, Dominion of Canada. The vehicles involved were a tanker truck owned by the British Yukon Navigation Company, hereinafter referred to as B.Y.N., driven by Balfour Keenan, and a Ford car owned and operated by Herman H. Ross of Anchorage, Alaska.

Separate actions against the B.Y.N. were filed by Herman H. Ross and his wife, Martha Cornelia Ross, who was a passenger in the Ross car at the time of the accident. The actions were filed in the District Court for the Fourth Judicial Division, Territory of Alaska, at Fairbanks, Alaska.

The defendant filed an answer in the Martha Ross case and an answer and counter-claim in the Herman Ross case. Prior to trial an order consolidating the cases for the purpose of trial was entered.

The cases were tried before a jury and a verdict was returned against the plaintiffs on their complaints and against the defendant on its counter-claim. Judgment was entered on the jury's verdict. Motions for new trial were filed by the plaintiff and denied. This appeal followed.

STATEMENT OF FACTS.

Although a statement of facts is contained in Appellants' Brief (pp. 2-6), it is considered necessary to

embody in this brief a statement of facts which more closely reflects the facts contained in the record and which is consistent with the verdict of the jury.

Balfour "Blondie" Keenan, driver of the B.Y.N. truck, was a Canadian citizen, 28 years of age, married, and had one child (R. 430-431). He had been employed by B.Y.N. as a truck driver since 1944 and had driven the Alcan Highway since it was built (R. 432). On January 29, 1949, in connection with his employment with B.Y.N., he left Whitehorse for Swift River. He was driving a 1947 Ford truck loaded with fuel oil (R. 432). The Ford truck he was driving was twenty-two feet long, seven and one-half feet wide. The load of oil weighed approximately five ton and the truck itself weighed three ton (R. 434). The truck had an Eton rear axle with under and direct gears (R. 435).

As Keenan drove down the highway and approached MP 787 he saw Jack Shiell (R. 435). Keenan stopped the truck and picked up Shiell. The road in the general neighborhood of MP 787 was hilly, winding, curving and had a lot of up-grades. Keenan had the truck in high and under so that the truck would have more power and so that the load could be held back against more compression. After picking up Shiell they proceeded on down the highway toward Dawson Creek (R. 436). As Keenan came down the hill approaching MP 786 he was in third and under gear because of a curve at the bottom of the hill to the right and if you drive too fast without holding

your load back the truck would tip over (R. 437-438). The truck made the curve to the right, proceeded down the straight of way and began to ascend the hill near MP 786. As it did so the engine speed of the truck died down and Keenan shifted to second and underdrive (R. 439). Keenan had been driving the truck ever since it had been bought—about a year (R. 500). He usually shifted into second and under gear when the truck speed was around twelve to fifteen miles per hour. As the truck went up the hill near MP 786 Keenan was on his right hand side of the road (R. 439). He was looking straight ahead and up the hill. After Keenan had shifted gears he saw the top of a grey car. In a second or two it came into full view. When it came into full view it was sweeping wide at the corner and well into the center line on Keenan's side of the road. Because of this Keenan pulled over until his right wheels were up against the snow bank just as far off the road as he could possibly get (R. 440). The car was 200 feet away when he first saw it. Keenan's speed when he first saw it was twelve to fifteen miles per hour (R. 461). Ross was going too fast when he tried to get around the corner—estimated speed of thirty-five to forty miles per hour. For a second Keenan thought that the car was going by. It passed awful close and he felt something bump. Keenan tried his brake and number one gear but the truck wouldn't hold and started to run back down hill over to his left hand side of the road (R. 441). After the impact the forward progress of the truck may have been a foot or two (R. 441-497).

After the truck had rolled back down to its left side of the road Keenan got out and went up to the Ross car which was sitting at an angle on the road (R. 442). The right front wheel of the Ross car was about 15-18 feet from the right hand side of the road as he walked up to it (R. 469) or about two to four feet from Mr. Ross' right hand side of the road as shown in Exhibit "L" as the car was headed toward Whitehorse (R. 511). After the accident Mr. Ross was standing across where the accident happened (R. 487). He was standing more on Keenan's side of the road across the center line of the road from his car (R. 443, 488).

Jack Shiell was picked up by Keenan between MP 787 and 788 and rode on down the highway with him (R. 516). As you approach MP 786 you come down off a gradual curve, cross a fill and culvert and then go up grade (R. 517). At the bottom of the hill the truck was in underdrive (R. 518). As the truck started up the hill the speed decreased and Keenan shifted gears (R. 518). The road between MP 770 and 800 is a crooked road up and down hill—the worst part of the Alcan Highway. There are very few trucks that can go through there unless in underdrive (R. 544). He was watching the right side of the road as the snow plow had plowed the snow out over the edge of the grade and you are likely to run over that and your wheels drop over and you can't get the truck back in the road (R. 548-549). He noticed the truck gradually going into the snow and looked ahead and saw a car coming a short distance away (R. 519, 542). It

was around the center of the road and looked like it was coming fast (R. 519). The car passed quite close to the truck, went out of sight and he then felt the impact (R. 520). He didn't know whether the truck stopped immediately or whether it rolled ahead a few feet (R. 542). Afterwards he saw glass and a headlight rim where the collision occurred about ten or eleven feet across the road from the Ross car and a little toward Whitehorse (R. 550-551). It was on the right hand side of the center line of the highway facing toward Watson Lake (R. 584).

The first vehicle to come along was B.Y.N. bus headed toward Whitehorse driven by N. L. Berg. It came by about twenty minutes after the accident (R. 445). Berg was driving a 22 passenger, Pony Cruiser, a cab over job, where the driver sits in the extreme front of the coach. Berg's bus had dual wheels (R. 596). As Berg approached the scene of the accident he was flagged down by Keenan (R. 597). He then drove down the road toward the car and tanker and as he did so he saw skid marks of the car quite clearly. He stopped near the grey car and then moved the bus forward again (R. 599). The bus was stopped this time quite close to front of the car so that the bus was sitting pretty well in front of the Ross car. He stopped as close as possible so that Mrs. Ross could be carried from the car to the bus (R. 599). He got out of the bus and walked around to the left side of his bus as it faced Whitehorse and looked around to see what had caused the accident (R. 600-601). He saw glass on the road and some discoloration (R. 601).

The discoloration was to the left of his bus as it faced Whitehorse and started at a distance from the snowbank (R. 632). He saw the truck tracks and observed where the right hand wheels of the truck were out in the snow. The forward progress of the truck from the point of impact was not over a foot or two (R. 601). He could see where the right dual wheel of the truck stopped in the snow. The truck tracks extended beyond the point of impact about the length of the truck (R. 602). The road at point of impact was wide enough that when he drove his bus up in front of the Ross car there was still some distance on the left side of his bus. The bus was eight feet wide (R. 641). Mr. and Mrs. Ross boarded his bus and drove to Teslin (R. 602, 603). In coming down the road to the Ross car the bus was pretty well to the center of the road and six tires would pass over the road (R. 623-624). Between the scene of the accident and Teslin he met Norman Hartnell who was driving a B.Y.N. bus toward Dawson. They both stopped and had a conversation (R. 603).

Norman Hartnell was the next person to arrive at the scene of the accident. He was driving a B.Y.N. bus from Whitehorse to Dawson (R. 671). He arrived at the scene of the accident between 1:00 and 1:30 (R. 677). At the scene he parked the bus he was driving on the left side of the road facing Dawson Creek. He got out and made an examination to determine the approximate point of impact (R. 673). The markings were quite plain. Opposite the highway by the car there were dark marks on the snow, a bit of

very fine glass and marking on the snow where some liquid had fallen. He could see where the right hand dual wheels of the truck driven by Keenan had been plowing against the snow bank on the right hand side of the road as you faced Dawson Creek (R. 674). The point of impact would be about eight feet from Keenan's right hand side of the road. Hartnell back-tracked the tracks of the truck to determine its position immediately preceding the impact. The truck tracks were well defined in the skiff snow on the right hand side of the road for some twenty to thirty feet back from the point of impact. The Ross car was slightly uphill but about directly across from the point of impact. The forward progress of the truck, after the impact was very slight (R. 675-687-889). Hartnell remained at the scene for about one-half hour (R. 677). When he left Jack Shiell accompanied him. The first vehicles they met after leaving the scene of the accident were two trucks belonging to Schmidt or North American Company (R. 678-679).

The next two vehicles past the point of impact were two George Schmidt trucks going toward Whitehorse. Both of these trucks as well as the busses driven by Berg and Hartnell had dual rear wheels (R. 450). The next vehicle to pass the scene was a 1948 Plymouth Sedan driven by a group of Canadian soldiers (R. 451-452). After the car had proceeded on down the highway Keenan got into his truck and sat there (R. 452). He dozed and the next person who arrived at the scene of the accident was Constable Shaw of the Royal Canadian Mounted Police (R. 453).

Shaw talked to Mr. Ross aboard the bus at Teslin in the presence of Mrs. Ross (R. 394). Mr. Ross, among other things told him that he was driving about twenty miles per hour (R. 395; 419). Mrs. Ross made a similar statement as to his speed to N. M. Keobke on February 1, 1950 (R. 429). Shaw proceeded to the scene of the accident. About two hours' time had elapsed from the time of the accident (R. 396; 407). His investigation was impaired by the fact that numerous vehicles had traveled past the vehicles involved and had obliterated the tire marks (R. 396; 413; 423). It would only take one big truck to obliterate the lot (R. 423). He noted a tire mark made by a truck when it had crowded off to the extreme right of the road. The mark was in eight to ten inches of loose snow and extended very little more than the length of the truck past the point of impact (R. 396; 410). These tire marks indicated that Keenan was about two feet from the edge of the shoulder to his right and that the distance from the left hand side of the truck driven by Keenan to his left hand side of the road would be approximately eleven feet (R. 396). The right hand wheels were in the snow off the plowed road. With the truck in that position there would be room for a car coming in the opposite direction to pass without collision (R. 409). He determined the point of collision by broken glass, anti-freeze and from oil that had leaked from somewhere (R. 412). In his opinion the accident occurred about the center of the road (R. 425). He examined the truck and ascertained that the drive shaft, the left spring hanger and the

brake line was broken (R. 412). Shaw took a number of photographs. Defendant's Exhibit 14, one of the photographs shows Keenan standing on the extreme right of the road at the termination of the tire marks made by his vehicle. Further down the hill on a spot slightly below the point of impact there is another man standing in the tire marks made by the B.Y.N. truck (R. 402). The man in the forefront of the picture is standing at the farthest point of mark made in the snow. The two men are standing at the beginning and end of the marks. The distance between the two men would be approximately thirty-five to forty feet (R. 415).

John Stevenson, camp Foreman, Department of Defense, Canadian Army, Brooks Brook, Mile 830, Alaskan Highway, lifted the Ross car with a wrecker and removed it to Teslin (R. 693-695). Keenan helped to hook the car up when it was taken away by the wrecker (R. 496). Taylor & Drury later hoisted the front end of the Ross car with a wrecker and towed it to Whitehorse (R. 780).

Errol Keobke was a master mechanic for B.Y.N., and had been a mechanic for thirty years. About the past seventeen years had been an automotive mechanic (SR. 3). He testified that Keenan was, on January 29, 1949, driving a 1949 three ton Ford, twenty-two feet in length and seven and one-half feet in width, equipped with an Eton two speed rear axle (SR. 3). The purpose of an underdrive is to give more power to the truck by increasing the gear ratio. As the gear

ratio increases the speed of the truck would increase. (SR. 4). A 1949 Ford Club Coupe would weigh 4,150 pounds and be 196.8 inches in length, 72.8 inches in width (SR. 27-28). The speed of a truck identical to the one driven by Keenan when in second and under-gear on a leval road would be approximately 13 miles per hour (SR. 11; 54). On examination the left rear wheel of the truck was bent and twisted. The tire had a 6 inch cut in it. The spring hangers were sheared off and the left rear spring was bent and twisted. There was an off-set of about three inches in the frame to the rear. The rear drive shaft had pulled out of the universal joint and the rear brake hose was broken. The truck frame was made of special alloy steel. The off-set in the frame was to the right of the truck (SR. 13). There were four universal joints on the drive shaft and at one of the joints the drive shaft was pulled out of the universal joint and had dropped to the ground (SR. 14-16). When the wheels turn the drive shaft would keep revolving to the left and if the truck went forward the drive shaft would gravitate to the left and eventually would swing around and come under the wheel and the truck would run over it (SR. 16). That section of the drive shaft was okeh when the truck was repaired (SR. 16-17). With the spring hanger sheared off the left rear wheel went back at least three inches and with the left rear wheel in this position the rear end of the truck would gravitate out to the left or the driver's side if the truck had gone forward. When the truck stopped and started backing down again the left rear wheel would be pushed

in the opposite direction and as the truck backed down it would have a tendency on that curve to go across the road (SR. 17). Ex. 16.

Errol Keobke had examined the Ross car and in his opinion it would have cost about $550.00 to $600.00 to put the car back into first class condition (SR. 30-34). Koebke was handed plaintiffs' Exhibit "C" (SR. 41). He testified that the Ross car had an overdrive (SR. 43; 45). The 1949 Ford two door Coupe has a fully automatic overdrive. An overdrive cuts down the engine speed for the miles per hour. It automatically changes the gear ratios in the rear end (SR. 43). An overdrive increases the speed approximately twenty-five per cent on the RPM of the engine (SR. 43-44). In an automatic overdrive you push the button on the dash in and when your car reaches approximately twenty-six miles per hour you let up on the accelerator pedal and it automatically slips in there, itself. Then if you want to go into direct drive again, push down the accelerator pedal until you contact a little switch underneath the accelerator pedal and that throws an electric solenoid on this transmission, that pulls it out then into direct gear. Then, if you get onto certain types of roads or in traffic—and, of course, it is not good policy to use your overdrive them—you pull this control on the dash all the way out and that locks it into direct gear or conventional drive (SR. 44).

When a truck is in for repairs the driver is off until the truck is repaired (SR. 54). So far as he knew Keenan was off work only three weeks (SR. 67).

There was no gutter on Ross' right hand side of the road (R. 407-Shaw) (R. 467-Keenan). The unplowed snow on Mr. Ross' right hand side was two and one-half to three feet deep (R. 407).

In his six years' experience as a truck driver Keenan had never had an accident prior to January 29, 1949.

Ross described the curve as a sharp curve (R. 220). Col. Walters described it as a long sweeping curve (R. 272; 289), and testified that he came into the curve at about twenty-seven and one-half miles per hour or at his normal driving speed (R. 289). Mr. Ross was driving twelve to fifteen miles per hour in second gear and had been in second gear for some time (R. 95). Ross, in a deposition taken August 30, 1949, testified that the truck was fifty or sixty or possibly seventy-five feet away when he first saw it (R. 222). At the trial he testified that the truck must have been 175 or 200 feet away when he first saw it. (R. 221).

Ross didn't mention that he had honked his horn in his deposition (R. 228; 238), nor in a list of question and answers subsequently prepared by him (R. 240-241), nor was this mentioned by Ross until November 12, 1950, after he had made a trip to Whitehorse with appellee's attorney, on which trip appellee's attorney sounded the horn on his car as he approached hills and curves (R. 240-242).

Dr. Haggland testified that Ross would have a seventy per cent chance of a perfect result (R. 806) and assuming such that he would be up and around

within six months after leaving the hospital. That after he recovered he thought Ross would be as good as new (R. 811). With reference to whether or not Ross was suffering a great deal of pain Dr. Haggland stated that, it being a subjective symptom that he merely had to take the patient's word for that (R. 808-809). He testified that if Ross had contacted him on February 4, that he would have treated him conservatively. That he would have put him to bed and put traction on both legs for a period of at least three or four weeks. If then free from pain and symptoms would have allowed him to get up and given him back support along with graduated exercises. If the symptoms persisted and were not alleviated he would recommend surgery (R. 812). He further testified that by myelogram he could, in most cases, definitely determine within an hour's time whether such person had a ruptured disc (R. 814). That before he would recommend surgery on Ross he should have a myelogram and if the diagnosis was confirmed surgery would follow and would improve his condition (R. 816).

On December 3, 1950 Dr. Haggland examined Mr. Ross (R. 798). In his testimony at page 801, Transcript of Record, Dr. Haggland stated: "The usual procedures of rest, graduated exercises, physiotherapy, back supports, have all been carried out." Presumably this statement is based upon the case history as given to Dr. Haggland by Mr. Ross. In reality, Mr. Ross had worn the brace since approximately December

1st. The record discloses no evidence that he took graduated exercises.

Mr. Ross testified that he hadn't been to see Dr. Martin except for X-ray pictures for some little time but was still under his care (R. 152), that Dr. Martin had prescribed baths, massaging and told him to just take good care of himself (R. 264, 265).

ARGUMENT AND AUTHORITIES.

FIRST ARGUMENT.

SPECIFICATION OF ERROR NUMBER ONE:

The verdict, as rendered, was not supported by sufficient evidence but was contrary to the evidence.

SPECIFICATION OF ERROR NUMBER TWO:

That the verdict, as rendered, was against the law.

It is apparent from appellants' specifications of error numbers One and Two that this appeal is in fact, an attempt to reargue the entire case in the hope of inducing this Court to substitute its judgment for that of the trial jury. This is revealed by the indefinite and generalized nature of these specifications of error. They are not proper or sufficient specifications of error and should not be considered by this Court.

Rule 20, 2(d), Circuit Court of Appeals, Ninth Circuit.

A violation of the Court rule justifies the Court in reviewing to consider the specifications which violate the rule.

Century Indemnity Company v. Nelson, 9th Cir., 90 Fed. (2d) 644, 648.

Specifications of error that the Court erred in entering judgment on the verdict in that the verdict was against the law and unsupported by the evidence presented nothing for review.

Inland Power and Light Co. v. Grieger, 9th Cir., 90 Fed. (2d) 811, 818;

Humphrey Coal Corporation v. Lewis, 9th Cir., 90 Fed. (2d) 896, 898;

Radius v. Travelers Insurance Company, 9th Cir., 87 Fed. (2d) 412, 413;

Mutual Life Insurance Co. of New York v. Wells Fargo Bank and Union Trust Co., 9th Cir., 86 Fed. (2d) 585, 587;

Dalton Rubber Manufacturing Co. v. Sabra, 9th Cir., 63 Fed. (2d) 865;

Hecht v. Alfaro, 9th Cir., 10 Fed. (2d) 464, 466.

Without waiving our objections to the inadequate specifications of error, appellee will proceed to argue the points sought to be raised.

Appellants predicate their argument upon the mistaken assumption that the testimony offered in their behalf was the only testimony to be considered by the jury. Their arguments are not based upon the record but are predicated upon their opinion as to what the evidence was. They, in effect, request this Court to adopt their opinions as to the weight and credibility to be given to the testimony of the various witnesses and to completely disregard the conclusions reached by the jury. However, it is well settled that the jury

is the judge of the credibility of the witnesses and of the weight to be attached to the testimony of each.

In considering the testimony offered by plaintiffs in the present case the jury, together with other things, was entitled to consider that Herman Ross was seeking to recover a total of $45,655.58; Martha Cornelia Ross was seeking to recover a total of $30,773.80; that Charles Edward Baxter was employed by plaintiffs for the express purpose of helping them out in their cases and testified that he had agreed to do anything he could to help them (R. 744); and that Colonel Walters was not an eyewitness but based his testimony upon his attempt to reconstruct the accident (R. 295-296).

An impartial consideration of the entire record reflects that the contentions advanced by appellee are well founded and that the statement of facts contained in appellee's brief are based on the record. The testimony of Keenan, Shiell, Berg and Hartnell places the point of impact across the center line of the road on Keenan's right hand side and on appellants' left hand side of the road. It is readily apparent from the record that the testimony of the plaintiffs and the defendant was conflicting and, on many material points, was diametrically the opposite. The plaintiffs contended that they were on their extreme right hand side of the road and almost stopped when the truck, which allegedly was speeding and on its wrong side of the road, struck them. Defendant contended that its truck was on its extreme right hand side of the road travel-

ing at a low rate of speed when the plaintiffs' car, which was traveling at a high rate of speed and occupying the middle of the road, ran into its truck. The jury, as the triers of the fact, found that the evidence supported the defendant's theory of the case.

The cases cited and the arguments advanced by appellants on pages 12 to 18 of their Brief are not in point with the factual situation here presented. Admittedly the testimony in the case was conflicting, yet a consideration of the entire record reflects that the verdict was supported by substantial evidence. The appellants failed to prove their cases to the satisfaction of the jury by a preponderance of the evidence. The appellants have failed to call to this Court's attention the particular respects wherein they claim the verdict was not supported by the evidence or was contrary to law. They merely make these assertions and express their dismay over the fact that the jury elected to disbelieve the testimony advanced in their behalf.

If a verdict is supported by substantial evidence or based upon conflicting evidence from which different inferences might be drawn, leaving the Court doubtful, it will not ordinarily be disturbed. It is not a sufficient ground for a new trial that the verdict is against the preponderance of the testimony, or that the Court might have arrived at a different result. The verdict must be manifestly and palpably against the evidence.

Cyc. Fed. Proc. (2d Ed.) Volume 8, 125-126.

A verdict on conflicting evidence will not be disturbed on appeal.

Lavender v. Kurn, 327 U.S. 645;

New York L.E.D.W.R. Co. v. Winters Adm'r., 143 U.S. 60;

Aetna Life Insurance Co. v. Ward, 140 U.S. 76.

The refusal of the Court below to set aside a verdict on the ground that it was against the weight of evidence cannot be reviewed on appeal.

Home Insurance Co. of New York v. Barton, 80 U.S. 603.

The denial of a motion for new trial is within the trial Court's sound discretion and hence not reviewable.

Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474-484;

Inland Power and Light Co. v. Grieger, cited supra;

Mutual Life Insurance Co. v. Wells Fargo Bank and Union Trust Co., cited supra;

Dayton Rubber Co. v. Sabra, cited supra.

With reference to the affidavit of Otto Menzel, filed by appellants in support of their motion for a new trial, it is apparent that the affidavit is an attempt to impeach the verdict of the jury and should not be considered.

McDonald v. Pless, 238 U.S. 264, 267, 269;

Bateman v. Donovan, 9th Cir., 131 Fed. (2d), 759, 764;

Department of Water and Power of City of L. A. v. Anderson, 9th Cir., 95 Fed. (2d) 577, 586;

Spokane International Railway Company v. U. S., 9th Cir., 72 Fed. (2d) 430, 433.

With reference to appellants' assertion that the trial Court indicated its bias and prejudice in allowing the appellee excessive costs and attorney's fees, it is to be noted that a notice of taxation of costs was duly served on each appellant (see pages 4, 7, Appendix, Appellee's Brief). Costs were subsequently taxed without objection being taken by either appellant. In fixing the amount of attorney's fees it appears the same were computed in accordance with a proposed Court Rule (see page 1, Appellee's Brief). However, it seems that there is an error of One Hundred Dollars ($100.00) in the computation of the attorney's fees in the Herman H. Ross case and the amount thereof, after allowing him in offset the amount to which he was entitled by reason of his having prevailed on the counterclaim of the defendant, should be $828.28, instead of $928.28.

Taking into consideration the circumstances that the incident out of which these cases arose, occurred in the Dominion of Canada, that numerous depositions were necessarily taken, that the place of trial was away from the residence of the parties and attorneys, and the number of days spent in trial, it could more logically be contended that the amount allowed by the

Court for attorney's fees was inadequate rather than excessive.

Rule 54-D, Federal Rules of Civil Procedure provides:

> "(D). Costs. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the Court otherwise directs * * *. Costs may be taxed by the Clerk on one day's notice. On motion served within five days thereafter, the action of the Clerk may be reviewed by the Court."

Section 55-11-55, Alaska Compiled Laws Annotated, 1949, provides, in part, as follows:

> "A party entitled to costs shall also be allowed all necessary disbursements, including the fees of officers and witnesses, the necessary expense of taking depositions, by commission or otherwise, * * *; witness fees for each day a witness is necessarily absent from his usual place of abode by reason of attendance upon court, with traveling expenses at 15c per mile actually and necessarily traveled * * *; and a reasonable attorney's fee to be fixed by the Court."

In view of the fact that appellant did not move against the cost bill or object to the costs as awarded by the trial Court and inasmuch as costs and attorney's fees were fixed in accordance with the pertinent provisions of the Federal Rules of Civil Procedure and Territorial Laws, it would seem that appellant's assertion in this regard is entirely without merit.

SPECIFICATION OF ERROR NUMBER TEN:

The Court erred in overruling appellants' motions for a new trial, including the motions made and based upon newly discovered evidence.

This specification of error is not proper or sufficient and should not be considered.

Rule 20, 2(d), Circuit Court of Appeals, Ninth Circuit;

Century Indemnity Company v. Nelson, cited supra.

Without waiving the above objection, appellee will proceed to argue the point sought to be raised.

It is evident that the testimony of Joe Landry which was offered (R. 730-732) was not newly discovered and if believed by the jury, it might or might not tend to impeach the testimony of Constable Shaw. There is certainly no showing that the outcome of the trial would necessarily have been changed by the admission of such testimony.

Assuming for the purpose of argument, that the entire testimony of Constable Shaw had been excluded from the record it is submitted that the verdict of the jury would have been the same and that such verdict would be supported by substantial evidence. It is apparent from the record that Shaw arrived at the scene some two hours after the accident and that his investigation was seriously impaired by the fact that numerous vehicles had passed by. Shaw's testimony was not in the same category as that of Keenan and Shiell who were eyewitnesses, nor in the category of

the testimony of Berg and Hartnell who were the first and second persons, respectively, to arrive at the scene after the happening of the accident. Shaw's testimony would be more in the category of Lt. Col. Walters who arrived at the scene after considerable traffic had passed and who, like Shaw, based his testimony upon an attempt to reconstruct the accident.

To Landry's testimony the following objections were made:

> "Mr. Plummer. If the Court please, I object to this on the ground that it is hearsay.
>
> Mr. Bell. Well, it is impeaching Mr. Shaw, who testified in the case. It is for that purpose only.
>
> Mr. Plummer. If the Court please, there has been no foundation on the impeaching question. I object on the ground that there has been no foundation laid.
>
> The Court. Objection sustained." (R. 730).

> "Mr. Plummer. Object on the grounds it is incompetent, irrelevant and immaterial. Seeks to elicit hearsay testimony. There is no basis whatsoever laid—basis or foundation laid for an impeaching question." (R. 732).

Section 58-4-62, Alaska Compiled Laws Annotated, 1949, provides in part:

> "The witness may also be impeached by evidence that he has made at other times statements inconsistent with the present testimony; but before this can be done the statements must be related to him, with the circumstances of times,

places, and persons present; and he shall be asked whether he had made such statements, and if so, allowed to explain them."

The Advisory Committee's April, 1937 draft of the Federal Rules of Civil Procedure, as revised by its final report, November, 1937, the last sentence of Rule 26(f) read (the brackets have been supplied):

"At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or any other party [and, without having first called them to the deponent's attention, may show statements contradictory thereto made at anytime by the deponent]."

The Court, in its promulgating order of December, 1937, struck out the material enclosed in brackets and made a comparable change in the Advisory Committee's recommended Rule 43-B dealing with the scope of examination and cross examination.

In *Ayers v. Watson,* 132 U.S. 394, the Supreme Court, in an opinion by Mr. Justice Miller, stated:

"The circumstances under which the former statements of a witness in regard to the subject matter of his testimony, when examined in the principal case, can be introduced to contradict or impeach his testimony, are well settled, *and are the same whether his testimony in the principal case is given orally in court before the jury or is taken by deposition and afterwards read to them.* (Emphasis supplied) In all such cases, even where the matter occurs on the spur of the moment in a trial before a jury, and where the objec-

> tionable testimony may then come for the first time to the knowledge of the opposite party, it is the rule that before those former declarations can be used to impeach or contradict the witness, his attention must be called to what may be brought forward for that purpose, and this must be done with great particularity as to time and place and circumstances, so that he can deny it, or make any explanation intending to reconcile what he formerly said with what he is now testifying * * *."

With respect to the deposition of C. C. Sommers, it is significant that no attempt was made to read the deposition into evidence at the trial nor was a formal offer of proof made thereof. From answers 6, 8 and 9 given by Sommers in his deposition it is impossible to determine whether the alleged statements were made by Keenan or McNair. Sommers' statement, "At the meeting he told *him* (emphasis supplied) to let's go see Slim Baxter and let Slim handle the deal and in the presence of Slim Baxter and his wife the above conversation was repeated," indicates that Sommers was talking to only one person. The testimony of Errol Keobke was to the effect that Keenan was off work as a result of the accident for only three weeks. Sommers states that the person with whom he was talking had been off work two or three months. Sommers stated the conversation was repeated in the presence of Slim Baxter and his wife. Baxter, during the taking of his deposition at Whitehorse, Yukon Territory, on October 31, 1949, testified, under oath, that Keenan

had not on any occasion admitted to him that he was responsible for the accident. (R. 137).

The alleged conversation occurred on Friday, June 17 or Saturday, June 18, 1949 around noon. Baxter was asked by Mr. Ross in April of 1949 to help him in connection with his case (R. 744). Mr. Ross testified that Baxter was his agent (R. 353). It would seem only logical to assume that Baxter, in his endeavor to help Mr. Ross, would have communicated the alleged conversation between Sommers and the truck driver to Mr. Ross shortly after June 17, 1949 and that Ross was aware of this conversation shortly thereafter.

On November 18, 1949 the plaintiffs served a notice upon the defendant that they would, by written interrogatories, take the deposition of C. C. Sommers on the 25th day of November, 1949 (R. 49B). On November 21, 1949 defendant served on plaintiffs a motion to vacate the notice to take the deposition of C. C. Sommers on the ground that proper notice had not been given in accordance with Rule 31-A, Federal Rules of Civil Procedure (R. 48-49A). The defendant's motion to vacate the notice to take deposition was granted on November 29, 1949 (R. 58).

The trial of these cases began on December 5, 1949 and ended on December 13, 1949. Plaintiffs knew on November 29, 1949 that defendant's motion had been granted. They therefore, had five full days prior to the beginning of the trial or fourteen days prior to the conclusion of the trial in which to get the witness Sommers to Fairbanks. Under present day methods of

communication and air travel this could easily have been accomplished. It would seem logical to assume that they would have done so had they considered his testimony as indispensable as they now assert it to be.

The alleged statements were made in the presence of Slim Baxter and his wife. Baxter was in attendance as a witness throughout the entire trial and testified on behalf of the plaintiffs in their case in chief and in rebuttal. There is no showing that his wife was not readily available as a witness. Certainly, had the appellants truthfully desired to avail themselves of the substance of Sommer's testimony they could have laid a proper foundation therefor by asking Keenan whether or not on the 17th or 18th day of June, 1949 at Whitehorse, Yukon Territory, at Slim Baxter's place in the presence of Sommers, Mrs. Baxter and Slim Baxter, he had made the alleged statements. If Keenan had denied such statements then Baxter or his wife, who were present when the alleged conversation was repeated, could have then been called to impeach Keenan's testimony.

The appellants apparently made no effort to have the witness Sommers personally present at the trial; they did not lay a foundation for such impeaching testimony while Keenan was on the witness stand. They did not offer to have the deposition read into evidence during the trial and consequently no formal offer of proof was made. Their entire course of conduct indicates that they actually had no intention or desire to have this testimony placed before the jury. To the contrary, it is indicative of a deliberate effort

on their part not to interject this testimony into the trial.

Assuming for the purpose of argument, that proper notice had been given in connection with the taking of this deposition, and further assuming, that a proper foundation had been laid and the deposition had been offered during the course of the trial, it clearly would have been inadmissible to impeach Keenan inasmuch as it fails completely to identify Keenan as the person who made the alleged statements to Sommers.

The Court may, in its discretion, allow a new trial or rehearing because of newly discovered evidence, provided it is satisfied that the evidence relied on is newly discovered in fact, and not such as could have been produced by the exercise of reasonable diligence at the former trial, and that the newly discovered evidence is such as will change the prior result.

Vol. VIII, Cyc. Fed. Pro. (2d Ed.) pp. 118-120.

It is well settled that a new trial will not be granted upon the ground of newly discovered evidence where it appears that such new evidence can have no other effect than to discredit the testimony of a witness at the original trial, contradict a witness' statement, or impeach a witness, unless the testimony of the witness who is sought to be impeached was so important to the issue, and the evidence impeaching the witness so strong and convincing that a definite result must necessarily follow.

39 Am. Jur., pp. 173-174.

The testimony of Landry and Sommers was not newly discovered. Landry's testimony was offered for

the sole purpose of impeaching Shaw. No foundation had been laid for the admission of such testimony. It is apparent that any claim of error founded upon the trial Court's refusal to grant a new trial, including the motions made and based upon alleged newly discovered evidence, is without merit.

SECOND ARGUMENT.

SPECIFICATION OF ERROR NUMBER NINE:

The Court erred in not declaring a mistrial by reason of the misconduct of appellee's counsel, Raymond E. Plummer, after strenuous objections had been made by appellants' counsel, Bailey E. Bell.

SPECIFICATION OF ERROR NUMBER FIFTEEN:

The Court erred in not declaring a mistrial or in not reprimanding the counsel for appellee during the closing argument of appellants' attorney, wherein the appellee's attorney interrupted appellants' attorney at many intervals, and upon one occasion arose from his seat and shouted in very boisterous tones that the appellant, Herman H. Ross, was a perjurer and by so doing prevented the appellants from having a fair and impartial trial.

The above specifications of error are too vague and indefinite to constitute a reviewable assignment of error.

Rule 20, 2(d), Circuit Court of Appeals, Ninth Circuit;

Century Indemnity Company v. Nelson, cited supra.

At pages 785-786 R., the following transpired:

"Mr. Bell * * * Your Honor, I have no desire to have the arguments taken, unless Mr. Plummer and Clasby does, *and if for any reason* that anyone wants to take an exception to the statement

of counsel, your Honor could call the reporter as far as I am concerned. (Emphasis supplied).

The Court. Very well.

Mr. Hurley. May it please the Court, are you ready for the argument now?

The Court. Yes.

Mr. Hurley. Before discussing the evidence in this case, I think it might be well to call your attention to the fact that this is a trial of two cases, one case in which Mr. Ross is the plaintiff and the British Yukon Navigation is defendant——(interrupted)

Mr. Plummer. Excuse me, Mr. Hurley, I just wanted, if the Court please, we will waive the reporting and if it is necessary to call—*any objection raised to counsel's argument the reporter may be called.* (Emphasis supplied)

The Court. Very well, you may be excused then."

The affidavit with reference to the fact that appellants made no objections to the argument made by appellee's counsel is not denied (R. 152). Nor is it elsewhere made to appear that the appellants made or interposed any objection to said argument. By reason of the above stipulation and by reason of their failure to have called the Court Reporter to record any objections, if in fact the argument was objectionable, when the matter was fresh in the minds of the Court and counsel such objections were waived.

This Court should not now consider the affidavits filed by appellants in support of their motions for new trial.

Rule 75-N, Federal Rules of Civil Procedure, provides as follows:

> "(N) Appeals when no stenographic report was made. In the event no stenographic report of the evidence or proceedings at a hearing or trial was made, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection, for use instead of a stenographic transcript. This statement shall be served on the appellee who may serve objections or propose amendments thereto within ten days after service upon him. Thereupon, the statement, with the objections or proposed amendments, shall be submitted to the District Court for settlement and approval and as settled and approved shall be included by the Clerk of the Court in the record on appeal."

Instead of following Rule 75-N, appellants have supported their motions with voluminous affidavits. Such affidavits, upon which appellants place such great reliance, are subject to the inaccuracies of appellants' memory. This is clearly illustrated in the case of the affidavit of Herman H. Ross filed herein on January 6, 1950 (R. 120-121) in which Herman H. Ross unequivocally states that during the selection of the jury, Patrick H. O'Neil was asked by appellants' attorney, Bailey E. Bell, whether he was at the time being represented either directly or indirectly by any of counsel for the defendant and that said Patrick O'Neil either stated that he was not or remained silent. The transcript of record shows that no such or similar question was asked this juror (R. 43-47).

In *Lemley v. Christophersen,* 5th Cir., 150 Fed. (2d) 291, the appellant, in his brief, argued two grounds in connection with a motion for new trial relating to the argument of opposing counsel before the jury. The grounds were attempted to be supported by an affidavit of appellants' counsel but opposing counsel took issue as to what occurred. The Court, in its opinion, stated:

> "Rule 75 seems to permit appellant to relate initially his own record of proceedings, subject to objections to opposing counsel and settlement by the Judge, but is carrying the looseness of reform too far to sanction what is here attempted. The motion for a new trial is but an appeal to the presiding Judge for an exercise of his discretion to grant one, and his refusal is not ordinarily reviewable on appeal. The recitals in the motion of what happened in the trial, not certified by the Judge or conceded by opposing counsel, do not constitute a record of the proceedings upon which the Appellate Court may act."

If, however, the voluminous affidavits filed by appellants in support of their motions for new trial are considered by this Court it is respectfully requested that the affidavits filed by appellee in connection with such motions (R. 112-119); (R. 136-139); (R. 140-157); (R. 177-179), together with the written decision on motion for new trial filed by the trial Court also be considered.

Without waiving the foregoing objections appellee will proceed to argue the points sought to be raised.

Counsel has a right to interpose, during the argument of adverse counsel, to object to his mistating the evidence or transcending the limits of argument. Moreover, in order to base error thereon, the attention of the Court must be called to improper argument at the time it is made, by objecting thereto and obtaining a rule thereon. If the Court holds the objection to be admissible, he must be requested to reprimand the counsel and admonish and instruct the jury in reference thereto. Generally the argument must be interrupted at the moment it is made; to delay until the end of the argument is generally fatal to the objection. One who claims to be prejudiced by such improper and prejudicial remarks of counsel must object to same and obtain a ruling of the Court thereon.

Abbott's Civil Jury Trials, 5 Ed. 773-774.

Counsel for defense cannot as a rule remain silent, interpose no objections and after a verdict has been returned seize for the first time on the point that the comments to the jury were improper and prejudicial.

U. S. v. Socony Vacuum Oil Company, 310 U.S. 150;

Crumpton v. U. S., 138 U.S. 361-364;

Thomson v. Bowles, 8th Cir., 123 Fed. (2d) 487, 495;

Continental Casualty Co. v. Pouquette, 9th Cir., 28 Fed. (2d) 958, 960.

Objections to improper argument of counsel cannot be reviewed in the absence of a ruling by the trial Court on a demand therefor.

Odell Manufacturing Co. v. Tibbetts, 1st Cir., 212 Fed. 652;

Toledo S. T. & W. R. Co. v. Howe, 6th Cir., 191 Fed. 776.

Assuming for the purpose of argument, that the gross misconduct of appellee's counsel assumed the unbelievable proportions now attributed to it by appellants, it is equally unbelievable that appellant, Herman H. Ross, himself an attorney, and his very able attorneys, Bailey E. Bell, Julian A. Hurley and Mike Stepovich, Jr., sat by silently and never during the course of appellee's counsel's argument interposed a single objection. It is apparent from the number of objections raised by appellants' counsel during the course of the trial that they had no aversion toward interposing objections. The fact that no objections were made during the course of the argument of appellee's counsel is somewhat conclusive that appellants' counsel considered the same entirely proper and not objectionable in any respect.

The Court, in Instruction Ten (R. 82) instructed the jury as follows:

> "You should not permit the remarks or expressions of opinion by the attorneys in the case to influence your judgment unless the same are in conformity with the evidence or are logical deductions therefrom."

It is presumed that the jury followed this instruction and in view of the fact that appellants failed to interpose any objections to the conduct that they now assert was prejudicial there is plainly no error on the part of the Court for not declaring a mistrial of its own volition.

THIRD ARGUMENT.

SPECIFICATION OF ERROR NUMBER THREE:

That the case of Martha Cornelia Ross, one of the above named appellants, was not considered at all by the jury in arriving at its verdict.

SPECIFICATION OF ERROR NUMBER THIRTEEN:

Error of the Court in refusing to give competent, proper and correct instructions offered by the appellants.

The affidavit of Otto Menzel should not be considered for the purpose of impeaching the verdict of the jury.

McDonald v. Pless, cited supra;

Bateman v. Donovan, cited supra;

Department of Water and Power, City of L. A. v. Anderson, cited supra;

Spokane International Railway Company v. U. S., cited supra.

The trial Court in its instructions Five and Six (R. 73-77) explicitly instructed the jury that two separate cases were being tried, pointed out the difference and instructed that each case should be considered separately. Apparently the appellants were satisfied that the instructions given by the Court

adequately distinguished the two cases inasmuch as the two instructions requested certainly did not, to any extent, more clearly define the issues of the two cases.

Mr. Hurley, in his address to the jury stated:

> "Before discussing the evidence in this case, I think it might be well to call your attention to the fact that this is a trial of two cases, one case in which Mr. Ross is the plaintiff and the British Yukon Navigation, a corporation, is the defendant * * *." (R. 785).

There is no showing that the jury did not follow the Court's instructions and the admonition contained in Mr. Hurley's argument. In the absence of a showing to the contrary the presumption is that the jury followed the Court's instructions.

Plaintiffs' requested Instruction Number 2 (R. 69) is not a correct statement of the law applicable to the facts of this case in that it fails, among other things, to take into consideration the effect of contributory negligence on the part of the plaintiff, Martha Ross, and does not take into consideration the fact that it was necessary for the jury to find for Martha Cornelia Ross by a preponderance of all the evidence before a verdict could be returned in her favor.

With respect to plantiffs' requested Instruction Number 1 (R. 68), a reading of the defendant's Answer in Cause No. 6113 (R. 14-23) and the Answer in Cause No. 6129 (R. 24-32), makes it appear that the pleadings meet the requirement of Rule 8-B and Rule

14-B, Federal Rules of Civil Procedure, and that the plaintiffs' contention that the answers constitute a negative pregnant is without merit.

The Court properly refused to give plaintiffs' requested Instructions One and Two in that they are not correct statements of the law applicable to the facts of this case.

FOURTH ARGUMENT.

SPECIFICATION OF ERROR NUMBER FIVE:

The Court erred in allowing incompetent evidence to be introduced on the part of the appellee, over objections of the appellants, as shown by the transcript of the testimony and all Court proceedings.

SPECIFICATION OF ERROR NUMBER SIX:

The Court erred in refusing to strike the testimony of the appellee upon motion of the appellants in many instances as is shown by the transcript of the record and Court proceedings on file in this case.

SPECIFICATION OF ERROR NUMBER SEVEN:

The Court erred in sustaining objections to appellants' offered testimony in many instances when said testimony was competent, relevant and material to the issues in this case.

The above specifications of error are not proper or sufficient specifications of error and should not be considered.

Rule 20, 2(d), Circuit Court of Appeals, 9th Circuit;

Century Indemnity Co. v. Nelson, 9th Cir., cited supra;

Jung v. Bowles, 9th Cir., 152 Fed. (2d) 726.

Without waiving this objection appellee will proceed to argue the points sought to be raised.

With respect to the question asked Mr. Ross (R. 763) (Appellants' Brief 42, 43) it is obvious that the question called for a conclusion on the part of the witness and an objection on that ground having been interposed, the trial Court correctly sustained the objection.

With respect to the proceedings at page 765, Transcript of Record (Appellants' Brief 43) it is believed that the ruling of the trial Court was correct in view of the following testimony given during the examination of Herman H. Ross, which appears at page 254, Transcript of Record:

> "By Mr. Plummer. Q. Now do you have any recollection of both Mr. Berge or Mr. McClary, the Postmaster at Teslin, or either of them, trying to persuade you to charter a plane and fly Mrs. Ross from Teslin to Whitehorse?
>
> A. No, I never heard of that.
>
> Q. That they would make the necessary arrangements with the R.C.A.F.—the Air Force over there?
>
> A. That is the first I heard of that, because I would have gone right away for that in a hurry.
>
> Q. You are sure of that?
>
> A. I don't recall anything like that. In fact, I think I inquired to see if there was any way I could get on a plane, and I don't recall them making any such statement, because I would have jumped at it."

With respect to the proceedings which occurred at page 766, Transcript of Record (Appellants' Brief 43-44), appellants make reference to the testimony of

Mr. Keenan at pages 442-444, Transcript of Record. The testimony of Keenan on those pages in substance, is to the effect that Mr. Ross made a statement, "Never mind my wife, look at my new car"; that he got in the car beside Mrs. Ross; that he picked up some kleenex and held it on Mrs. Ross' head; that Mr. Ross was going to pick up a headlight rim and that Keenan stated "No, Mr. Ross, you had better leave that there until the Mountie comes".

At page 756, Transcript of Record, on rebuttal, in response to questions put to him by attorney, Bailey E. Bell, Herman Ross testified in substance that he had a conversation out on the road with Keenan after the accident; he denied that he started to reach down and pick up a headlight rim or that he was told not to do so until the Mountie got there. He testified that nothing whatsoever happened like that (R. 759); he further denied that he made the statement, "Never mind my wife, look at my new car", and definitely stated that nothing like that took place (R. 759). He denied that Keenan had sat in the car by the side of Mrs. Ross (R. 760); he denied that Keenan had obtained kleenex and applied it to Mrs. Ross' face and stated that Keenan had not handled the kleenex in any way and that he never got close enough to the car to touch the kleenex (R. 760). It would, therefore, appear that appellant was not prevented from making his proof on this point, that the matter had been gone into fully at least once, and that the ruling of the trial Court was correct.

In this regard the Court's attention is called to the testimony of Mrs. Ross, on direct examination on rebuttal at pages 748 to 749, Transcript of Record, in response to questions put to her by attorney Bailey E. Bell, she stated in substance, that the conversation wherein Keenan contended Mr. Ross made the statement, "Never mind my wife, look at my new auto", did not take place; that Keenan did not get into the car beside her or sit inside the door at all; that Keenan did not put any kleenex on her face at all and that the closest he got to the car was some four or five feet.

With respect to the question to Mr. Ross by Mr. Bell on direct examination on rebuttal, Transcript of Record 767 (Appellants' Brief 44) appellee again called the Court's attention to the testimony of Mr. Ross at page 254, Transcript of Record. In view of this testimony it appears that the ruling of the trial Court was correct.

With respect to the proceedings at page 770, Transcript of Record (Appellants' Brief 44), appellants call the Court's attention to the testimony of Herman Ross, pages 148, 149, 762, 763, 764, 771, 772, Transcript of Record. The record thus shows that Herman Ross was permitted to testify fully in regard to his conversation with Constable Shaw.

Mr. Ross was present at the taking of Shaw's deposition on October 31, 1949. Shaw's testimony was presented to the jury by the reading of his deposition. Mr. Ross had a copy of this deposition which was made by Mr. Van Roggen's secretary (R. 404). He

knew, or should have known, what Shaw's testimony would be and if material portions of his conversation were omitted he should have offered the portions not mentioned by Shaw while testifiying as a witness in his own behalf in his case in chief.

With respect to the proceeding at page 772, Transcript of Record (Appellants' Brief 44-45) it is apparent that the question asked elicited hearsay answers which would not be binding on the defendant and the objections thereto were properly sustained.

With respect to the proceeding at page 773, Transcript of Record (Appellants' Brief 45-46), appellants claimed that the Court's refusal to admit the letter marked "Plaintiffs' Identification 31", which he claims was exactly the opposite of the testimony of Errol Keobke, was prejudicial. The letter is believed to be one written by Mr. Tubman, manager of the N. C. Co. at Whitehorse to Mr. Ross. Mr. Ross was present when Errol Koebke's deposition was taken on October 31, 1949 at Whitehorse. From that time on he was aware of the substance of Mr. Keobke's testimony. If appellants had desired this testimony they could have taken Mr. Tubman's deposition and presented his testimony in a proper manner. It is also apparent from the record of Errol Keobke's testimony that he was a qualified mechanic and that Mr. Tubman was not a mechanic but a parts man.

Furthermore, no prejudice resulted to appellant, as the substance of the desired testimony had been very artfully presented to the jury by Mr. Baxter, when at

page 353, Transcript of Record, he testified as follows:

> "A. When I went to see Mr. Tubman, Mr. Tubman told me he had written prior to that to Mr. Ross, that the car as far as they were concerned, was beyond repair; wasn't worth repair."

With respect to the proceedings at page 775, Transcript of Record (Appellants' Brief 46, 67), we quote from the record inasmuch as the same is inaccurately quoted in appellants' brief:

> "Mr. Bell. Exception. You may take the witness.
>
> The Court. Did you want to ask a question (to Juror O'Neill)?
>
> Juror O'Neill. Yes, may I? (*Judge nodded.*) (Emphasis supplied.) Mr. Ross, did you have insurance on your car?
>
> A. No sir, I did not. I was going to get insurance when I got to Anchorage.
>
> The Court. Well, this case will be in recess for ten minutes. The jury will be excused until called, and the case will be in recess for ten minutes. (*Whereupon, the trial of this case was recessed for ten minutes, while the Court heard other matters.*" (Emphasis supplied.)

It is apparent from the record that the trial judge nodded in response to Juror O'Neill's query, "Yes, may I?" and that Herman Ross, in response to the question asked by Mr. O'Neill, voluntarily, without any prompting on the part of the Court, and without objection by any of his counsel, proceeded to answer the question. There is nothing in the record to sup-

port Mr. Ross' assertion that he answered this question in response to a nod from the Judge. The answer being in the negative certainly could not have been prejudicial to him.

Nor can we, by any logical method, follow appellants' reasoning that the Court, having declared a recess for the purpose of taking up other matters was prejudicial to plaintiffs' case and that it was tantamount to a directed verdict for the defendant. Appellee calls the Court's attention to the fact the record shows that throughout the entire trial the Court took regular recesses. At page 727, Transcript of Record, the Court recessed for ten minutes. At page 756, Transcript of Record, the Court adjourned at 4:55 P.M. until 9 A.M. on December 13, 1949. On December 13, 1949 Herman Ross took the stand as a witness in his own behalf on rebuttal. At page 775 the Court declared the hourly recess and the trial was recessed while the Court heard other matters.

With respect to the proceedings on pages 776-777, Transcript of Record (Appellants' Brief 47-48), Mr. Ross, having testified to Constable Shaw's alleged statement to him, it is believed that the same was a proper subject of cross-examination. The jury was entitled to know Mr. Ross' reason for not having taken the deposition of Mr. Van Roggen for the purpose of impeaching Constable Shaw.

With respect to the proceedings at page 306, Transcript of Record (Appellants' Brief 48), the testimony sought to be elicited by the question to Mrs.

Ross was incompetent, irrelevant and immaterial and the objection properly sustained by the trial Court.

With respect to the proceedings at page 347, Transcript of Record (Appellants' Brief 49) immediately following the sustaining of the objection by the Court we find the following:

> "Your Honor—the Court, it is hearsay; wouldn't be admitted."

We once again state that no prejudice resulted to the plaintiffs as a result of the Court's ruling inasmuch as Mr. Baxter, at page 353, Transcript of Record, very artfully put this testimony before the jury in the following answer:

> "When I went to see Mr. Tubman, Mr. Tubman told me he had written prior to that to Mr. Ross, that the car, as far as they were concerned, was beyond repair, wasn't worth repair."

With respect to the proceedings at pages 348-349, 350 (Appellants' Brief 45, 50, 51 and 52), it is quite evident that plaintiff was not prevented from making his proof in answer to the testimony of Mr. Koebke that the car could be repaired for Five Hundred Dollars in view of Mr. Baxter's answer at page 353, Transcript of Record.

With respect to the proceedings at page 371, Transcript of Record, the Court's attention is called to the stipulation (Sup. to Record) the notice to take deposition (Appellee's Brief, Appendix ii) and the notice of filing depositions (Appellee's Brief, Appendix iii). As is apparent from the Transcript of Record 376-378,

the plaintiffs were represented by their attorney, George Van Roggen, in Whitehorse, who participated in the taking of the deposition and cross-examined the witness Herbert Wheeler.

With respect to the proceedings at page 375, Transcript of Record (Appellants' Brief 52), it is believed that the defendant's Exhibit 6 was competent, relevant and material and that proper identification had been made by the witness, Herbert V. G. Wheeler.

With reference to the proceedings at page 378, Transcript of Record (Appellants' Brief 53-54), the Court's attention is called to the fact that oral notice of the filing of the deposition of Herbert V. G. Wheeler and N. M. Keobke had been filed on December 5 (T.R. 5). It is also significant to note that appellants, through their attorney, George Van Roggen, participated in the taking of the depositions.

It is also interesting to note Mr. Bell's objection at page 378, T.R., as follows:

> "Mr. Bell. We object to that, Your Honor, for the reason it was not based upon any proper or adequate notice and we would not be bound by it."

The Court's attention has previously been called to a stipulation entered into by respective counsel for the parties with reference to the taking of the deposition at Whitehorse (Sup. to Rec.). Plaintiffs contended that this stipulation was binding only with reference to the depositions to be taken on October 31, 1949. However, it is interesting to note that as late as on or about December 9, 1949 when appellee was endeavor-

ing to read the deposition of Donald McLain into evidence, that Mr. Bell was objecting to the reading of this deposition on the ground that insufficient notice had been given and at page 666, Transcript of Record, stated as follows:

> "And I was relying upon my protest to the taking of it without the ten day notice that had been stipulated to."

Certainly if counsel for appellants were justified in relying upon the stipulation providing for ten days' notice counsel for appellee should be entitled to place the same reliance upon the stipulation.

With reference to the proceedings at pages 426-427, T.R., (Appellants' Brief 54), it appears that notice of the taking of the deposition was served (R. 50); that an oral notice of the filing thereof was given (R. 5), and that plaintiffs appeared and participated in the taking of the deposition through their attorney, George Van Roggen (R. 428-429).

With respect to the proceedings at pages 525-526 T.R. (Appellants' Brief 54-55) it does not appear that plaintiff was prejudiced by that part of the proceedings of which he complains inasmuch as the witness thereafter testified as follows:

> "Q. (Mr. Bell). From that map, from your recollection of where the impact took place, that is the point on the road, whether it was on the straight-away or curve, would you state, if you can, look on the map and tell the jury approximately where the point of impact occurred?
>
> A. Yes.

Q. Will you examine the map, study it over now until you are able to point it out?

A. I would say that the impact took place in this part of the road, here (indicating). I wouldn't definitely state any part right there within twenty or thirty feet, because I am not sure. It was a year ago or pretty nearly a year ago when the accident happened, and what makes me believe it was right there, was on account of this fairly straight piece of road here, and the car seemed to come across the road.

Q. Now, will you mark it 20 feet, or what you think is that 20 foot area? Mark it along well, you mark it where you think it was.

A. I don't know just what square this map is —(marking map with red pencil)."

Presumably the purpose of a law suit is to bring the full facts to the jury in order that a determination of the respective rights of the parties may be had thereon. The depositions were taken for the purpose of presenting additional facts to the Court and jury. Appellants were present through their counsel, Mr. Van Roggen and participated in the taking of these depositions. No motion was made to suppress them. Certainly no substantial right of appellants was effected by the Court's rulings.

Rule 29, Federal Rules of Civil Procedure provides:

"If the party so stipulate in writing, depositions may be taken before any person at any time or place upon any notice and in any manner and when so taken may be used like other depositions."

Appellants have made numerous and various assertions of error. However, they have failed completely to point out or demonstrate wherein they were prejudiced as a result of any of the Court's rulings.

It is incumbent upon one claiming error to show the error and to show that such error was prejudicial to him. Error will not be presumed but must be affirmatively shown.

Merryman v. U. S., 76 U.S. 592;
Boley v. Griswold, 87 U.S. 486;
Fidelity and Deposit Company of Maryland v. Lindholn, 66 Fed. (2d) 56;
Capital Savings and Loan Assoc. v. Olympia National Bank, 80 Fed. (2d) 561.

Rule 61, Federal Rules Civil Procedure, provides as follows:

> "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the Court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, nullifying or otherwise discharging a judgment or order unless refusal to take such action appears to the Court not consistent with substantial justice. The Court at every stage of the proceeding must disregard any error or defect in the proceeding which does not effect the substantial right of the parties."

While appellants have endeavored to search the record and to call this Court's attention to certain rul-

ings which they claim were erroneous, they have failed completely to show that they were substantially prejudiced by such rulings. When the matters assigned by appellants are considered in the light of the entire record, it is readily apparent that the Court's rulings were proper and that appellants were not thereby prejudiced.

FIFTH ARGUMENT.

SPECIFICATION OF ERROR NUMBER FOURTEEN:

The Court erred in allowing one of the jurors to bring into the case the question of insurance, without correcting the remarks of the juror, which question was brought into the case without the fault of the appellants and, which question was brought into the case to the great detriment of the appellants, to their prejudice, and prevented them from obtaining a fair and impartial trial.

This is the third time this point has been discussed in appellants' brief. It has twice been touched upon in appellee's brief. Inasmuch as there is no merit to appellants' claim of error it would appear that no further argument is necessary. Although appellants assert that this particular question was brought into the case to their great detriment and prejudice and prevented them from obtaining a fair and impartial trial, there has been no such showing and since appellants raised no objection whatsoever in the lower Court their assertion of error is not well founded. It would appear that this question in fact inured to their benefit inasmuch as it could logically be argued that the negative answer given by Herman H. Ross served the purpose of defeating defendant's counterclaim.

If in fact, appellants believe the question to be prejudicial to them and if in fact, they believed that Juror O'Neill had prejudged the case before it was finished it was incumbent upon them to bring such matters to the trial Court's attention at that time and not to wait until an adverse verdict had been returned.

SIXTH ARGUMENT.

SPECIFICATION OF ERROR NUMBER FOUR:

The Court erred in ordering a consolidation of the causes of action of Herman H. Ross and Martha Cornelia Ross for trial.

Rule 42 (a), Federal Rules Civil Procedure, reads as follows:

> "Consolidation: When actions involving a common question of law or fact or pleading before the Court it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid necessary costs or delay."
>
> "A motion for consolidation for trial of similar cases is addressed to the sound discretion of the court."
>
> *Williams S. S. Co., Inc. v. Wilbur, et al.,* 9th Cir. 9 Fed. (2d) 622.

In *Paulson v. Louisiana, Arkansas, and Texas Transportation Company,* 7 Fed. Rules Dec. 784, it was held:

> "In an action for damages where damages were sought in several cases arising out of an automo-

bile collision and the issues of fact and applicable principles of law were the same in both cases, except the added principles of law that under certain conditions negligence of the driver of the automobile would not be imputed to a guest, defendant's motion to consolidate the actions would be granted as against plaintiff's objection that jury would have so many awards to make in event of consolidation that it would be prone to reduce them all."

In *Pacific Indemnity Express Company v. Union Pacific Railway Company,* 10 Fed. Rules Dec. 61, 62:

"Actions against a railroad by administrator for death of truck driver and by owner of truck for property damage should be consolidated, though they involve different measures of damage and railroad interposed a counterclaim in action for property damage on ground of negligent operation of truck since a common question of law and fact was involved and identical evidence would be used in each case."

See also:

Brush v. Harkinen, 9 Fed. Rules Dec. 604, 605;
Miller v. Sammacco, 9 Fed. Rules Dec. 215, 216;
Gillette Motor Transport, Inc., et al. v. Northern Oklahoma Butane Company, 10th Cir., 179 Fed. (2d) 711, 712.

The present actions involved a common question of law and fact, there has been no showing that prejudice resulted to appellants by virtue of the order of consolidation and the Court's action in this respect was proper.

SEVENTH ARGUMENT.

SPECIFICATION OF ERROR NUMBER TWELVE:

Error of the Court in giving instructions which were objected to by the appellants and exceptions were allowed; all as shown by the records.

This specification of error does not meet the requirements of Rule 20, 2(d) and should not be considered.

Rule 20, 2(d) reads in part as follows:

> "In all cases, save those of admiralty, a specification of error relied upon which shall be numbered and is set out separately and particularly by error intended to be urged * * * when the error alleged is to the Judge of the Court the specification is set out in part referred to totidem verbis, whether it be in instructions given or in instructions refused, together with the grounds of the objections urged at the trial * * *."

Where specifications of error, complaining of instructions given jury and refusal of other instructions fail to set out the part referred to *totidem verbis,* together with ground of objection urged at the trial, as requested by Court of Appeals, Rule 20, 2(d), specifications were not required to be considered.

Thiel v. So. Pac. Co., 9th Cir., 169 Fed. (2d) 30, 32.

Subsection (c) of Instruction 3 (R. 72) is a correct statement of the law.

People v. Cassin, 322 Ill. 276, 278, 153 N.E. 381;

Oliver v. Kelley, 300 Ill. App. 487, 491, 21 N.E. (2d) 649.

Instruction No. 4 (R. 72, 73) is taken verbatim from the ordinance of the Yukon Territory, Dominion of Canada. Defendant's Exhibits "A" and "B" purport on their face to be the ordinance of the Yukon Territory, printed and published for the Government of the Yukon Territory, under authority of Chapter 75 of the Consolidated Ordinances of 1914.

Section 58-1-4, Alaska Compiled Laws Annotated, 1949, provides:

> "Printed books or pamphlets purporting on their face to be the Session or other statutes of any of the United States, or the Territories thereof, or of any foreign jurisdiction, and to have been printed and published by the authority of any such State, Territory or foreign jurisdiction, or proved to be commonly recognized in its courts, shall be received in the courts of this territory as prima facie evidence of such statute."

There is no evidence whatsoever on the part of the plaintiffs to overcome the *prima facie* evidence offered by the defendant and in the absence thereof it was proper for the Court to give the instructions now complained of.

Instruction 5 (Tr. 73-75), is a correct statement of law applicable to the case.

With reference to instruction number six (Tr. 75-76-77) appellants have singled out a portion of the instruction and assert that this portion constitutes an instruction by the Court that the jury must find Martha Ross contributorily negligent. From a fair reading of instruction number six in its entirety it is

obvious that the Court correctly instructed the jury that the negligence, if any, of Herman Ross could not be directly imputed to Martha Ross. That under the circumstances, that is, the circumstance of Herman Ross being negligent, before the negligence of Herman Ross could be imputed to Martha Ross, the jury must also find that Martha Cornelia Ross, as a reasonable and prudent individual, should have cautioned Herman Ross against his careless, negligent, driving and carelessly and negligently failed to so caution her husband or by her actions conceded to such careless and negligent driving. This instruction taken as a whole is an accurate statement of the law.

Instruction Number 7-B (R. 78) and Instruction Number 8 (R. 78) correctly state the law. The doctrine of comparative negligence has not been established by rule or statute in the Territory of Alaska and these instructions were proper.

See

15 *Am. Jur.,* Sec. 356, 357, pp. 795-798.

Instruction Number 10 (R. 80) was properly given. It is apparent from the record that the plaintiff had only nominal medical and doctor bills. It also appears that they had not consulted a doctor since about May 1, 1949, just shortly before the time of trial. Herman Ross testified that Dr. Martin had not prescribed a course of treatment but had advised him just to take care of himself. This he had done by taking hot baths and massage treatments (R. 214). From the testimony of Dr. Haggland, an orthopedic specialist, as to the

course of treatment he would have prescribed, had Herman Ross been his patient (R. 812) it is believed that the logical inferences to be drawn from the evidence was that Herman Ross had done very little with respect to his physical condition and the instruction was properly given.

The charge to the jury should be considered as a whole by the Appellate Court with a view to ascertaining, if possible, whether the rights of the complaining party were so prejudiced to prevent a fair trial. If, when so considered, the charge presents the law fairly and correctly to the jury, there is no ground for reversing the judgment, though some of the expressions, when standing alone, might be regarded as erroneous.

3 *Am. Jur.,* Sec. 1097, p. 623.

It is submitted that the instructions of the Court when taken as a whole, fairly and impartially covered the law of the case. The plaintiffs were apparently satisfied with the instructions inasmuch as they requested only two instructions which did not correctly state the law, and took a few general and vague exceptions to the instructions as given.

CONCLUSION.

The plaintiffs failed to prove their cases by preponderance of the credible evidence. The jury disbelieved the plaintiffs' theory of the case and did so logically in view of plaintiffs' Exhibit "L" and defendant's Exhibit 15. The plaintiffs selected the place

of trial and vigorously resisted a transfer from Fairbanks to Anchorage. There is no showing that the proceedings were biased or prejudiced against the plaintiffs, nor that there was misconduct upon the part of the jury.

The question relative to insurance was answered voluntarily and without objection by Herman Ross. If this question had any effect on the outcome of the trial it would have been to the benefit of the plaintiffs and to the detriment of the defendant.

The record reflects that regular recesses were taken during the course of the trial irrespective of whether plaintiffs' or defendant's witnesses were being interrogated.

No misconduct of counsel has been shown and the fact that no objections were taken by any of plaintiffs' attorneys is quite conclusive that no misconduct existed.

The matter of the consolidation of the cases was addressed to the sound discretion of the trial Court and there is no showing that this discretion was abused.

The Court's instructions clearly distinguished the two cases and no rights of either plaintiff were prejudiced by the Court's order.

A consideration of the entire record reflects that the Court's rulings as to the admissibility and exclusion of evidence were correct. The record in this case, as in all cases, speaks for itself. Instead of acknowledging the facts reflected by the record the plaintiffs seek to condemn the trial judge, the jury, individual

jurors and appellee's counsel by vitriolic and unfounded assertions. Such condemnation is unwarranted and without basis.

The plaintiffs were given a fair and impartial trial in a forum selected by them. The jury determined the cases adversely to the plaintiffs under proper instructions from the Court. The verdict is supported by substantial evidence and should not now be disturbed.

Dated, Anchorage, Alaska,
February 21, 1951.

Respectfully submitted,
PLUMMER & ARNELL,
By RAYMOND E. PLUMMER,
Attorneys for Appellee.

(Appendix Follows.)

Appendix.

PROPOSED AND GENERALLY ADHERED TO BUT NOT YET ADOPTED AS ONE OF THE JOINT RULES.

4. That a new rule shall be added as Rule Number 58, in words and figures as follows, to-wit:

"Rule 58. Attorney fees.

"Unless for good cause, the Court or Judge otherwise determines, the following schedule of attorneys fees will be allowed to the prevailing party in average cases in which attorney's fees are allowed by law, as part of the costs or disbursements:

LIEN CASES

Contested	Percent	Non-Contested
$1.00 to $1,000	30%	20%
next $4,000	15%	10%
next $5,000	5%	3%
10 to $15,000	2%	1%
15 to $25,000	1%	.5%
over $25,000	.5%	.25%

NON-LIEN CASES

Contested	Percent	Non-Contested
$1.00 to $1,000	25%	15%
1,000 to $2,000	15%	10%
2,000 to $3,000	10%	7.5%
3,000 to $4,000	5%	2%
4,000 to $5,000	5%	1%
5,000 to $10,000	2%	.5%
10 to $25,000	1%	.5%
over $25,000	.5%	.25%

Quiet Title, Replevin, and Ejectment suits to be the same as lien suits and based upon value of property.

Divorce suits: Contested $250.00; Uncontested, $150.00."

Endorsed
Filed in the District Court,
Territory of Alaska, 4th
Div., Nov. 9, 1949.
John B. Hall, Clerk,
By Olga T. Steger,
Deputy.

In the District Court for the Territory of Alaska,
Fourth Division

Herman H. Ross, Plaintiff, vs. The British Yukon Navigation Company, Ltd., a Corporation, Defendant.	No. 6113

NOTICE OF TAKING DEPOSITION

To: Herman H. Ross, plaintiff, and to Bailey E. Bell, of counsel for plaintiff:

You will please take notice, that pursuant to the stipulation previously entered into between counsel for the respective parties, that the defendant herein will take in the above-entitled action, to be used as authorized by the Federal Rules of Civil Procedure, the depositions of Morris Matevick; Johnny Sirman; Rose Sirman; Ted Geddis; George McNair; Mrs. George McNair; Jack Cherry; Norm Hartnell; Charles Edward Baxter; Harry Beatty; and John Doe, all of whom reside at Whitehorse, Yukon Territory, Dominion of Canada, before Williard L. Phelps,

or before some other Notary Public to be agreed upon by counsel for the parties, the said Williard L. Phelps being a Notary Public for the Yukon Territory, Dominion of Canada, and who is not of counsel or attorney for either of the parties to, nor a relative or employee of such counsel or attorney, nor interested in this cause, on the 18th day of November, 1949, at 10:00 a.m. in the forenoon of that day, and thereafter from day to day as the taking of the deposition may be adjourned, at the office of the said Williard L. Phelps, at Whitehorse, Yukon Territory, at which time and place you are hereby notified to appear and take such part in said examination as you may be advised and as shall be fit and proper.

Dated at Anchorage, Alaska, this 7th day of November, 1949.

Plummer & Arnell,
By /s/ Raymond E. Plummer,
Attorneys for Defendant.
220 Central Building,
Box 499,
Anchorage, Alaska.

Service of the above notice admitted this 7th day of November, 1949.

Bailey E. Bell, by mdb,
Of Counsel for Plaintiff.

Endorsed
Filed in the District Court,
Territory of Alaska, 4th
Div., Dec. 3, 1949.
/s/ John B. Hall,
Clerk.

In the District Court for the Territory of Alaska,
Fourth Division

Herman H. Ross, Plaintiff, vs. The British Yukon Navigation Company, Ltd., a Corporation, Defendant.	No. 6113

NOTICE

To: Herman H. Ross, plaintiff, and Bailey E. Bell, of counsel for plaintiff:

You are hereby notified that we have been informed by John B. Hall, Clerk of the District Court, Fourth Division, that the deposition of Charles Edward Baxter, Mrs. Marie McNair, John Cherry, Maurice Matwick, John Sirman, Mrs. Rose Sirman, Harry Beattie, and Herbert V. G. Wheeler, which were taken at Whitehorse, Yukon Territory, on the 18th day of November, 1949, have been filed with his office.

Plummer & Arnell,
By /s/ Raymond E. Plummer,
Attorneys for Defendant.
220 Central Building,
Box 499,
Anchorage, Alaska.

Service by receipt of a copy of the foregoing Notice is hereby acknowledged this 1st day of December, 1949.

Bailey E. Bell by mdb,
Of Counsel for Plaintiff.

Endorsed
Filed in the District Court,
Territory of Alaska, 4th
Div., May 10, 1950.
John B. Hall,
Clerk.

In the District Court for the Territory of Alaska,
Fourth Division

Herman H. Ross, Plaintiff, vs. The British Yukon Navigation Company, Ltd., a Corporation, Defendant.	No. 6113

NOTICE OF TAXATION OF COSTS

To: Bailey E. Bell, of counsel for the above-named plaintiff:

Please take notice that the attached bill of costs in in the above-entitled cause will be taxed before the Clerk of said Court at his office in Fairbanks on the 12th day of May, 1950, at 10:00 A.M. on said date.

Dated at Anchorage, Alaska, this 4th day of May, 1950.

Plummer & Arnell,
By /s/ Raymond E. Plummer,
Attorneys for Defendant.
220 Central Building.
Anchorage, Alaska.

Service of the foregoing Notice of Taxation of Costs by receipt of copy hereof acknowledged on this 4th day of May, 1950.

Bailey E. Bell by MDB,
Of Attorneys for the Plaintiff.

Endorsed
Filed in the District Court,
Territory of Alaska, 4th
Div., Nov. 25, 1949.
John B. Hall, Clerk,
By Olga T. Steger,
Deputy.

In the District Court for the Territory of Alaska,
Fourth Division

Martha Cornelia Ross, Plaintiff, vs. The British Yukon Navigation Company, Ltd., a Corporation, Defendant.	No. 6129

NOTICE OF TAKING DEPOSITION

To: Martha Cornelia Ross, plaintiff, and to Bailey E. Bell, of counsel for plaintiff:

You will please take notice, that pursuant to the stipulation previously entered into between counsel for the respective parties, that the defendant herein will take in the above entitled action, to be used as authorized by the Federal Rules of Civil Procedure, the deposition of N. M. Keobke, of Whitehorse, Yukon Territory, upon oral interrogatories, before Williard L. Phelps or before some other Notary Public to be agreed upon by counsel for the parties, the said Williard L. Phelps being a Notary Public for the Yukon Territory, Dominion of Canada, and who is not

of counsel or attorney for either of the parties to, nor a relative or employee of such counsel or attorney, nor interested in this cause, on the 2nd day of December, 1949, at the office of the said Williard L. Phelps, at Whitehorse, Yukon Territory, at the hour of 10:00 a.m. in the forenoon, at which time and place you are hereby notified to appear and take such part in said examination as you may be advised and as shall be fit and proper.

Dated at Anchorage, Alaska, this 21st day of November, 1949.

Plummer & Arnell,
By /s/ Raymond E. Plummer,
Attorneys for Defendant.
220 Central Building,
Box 499,
Anchorage, Alaska.

Service of the above notice admitted this 21st day of November, 1949.

Bailey E. Bell by m.d.b.,
Of Counsel for Plaintiff.

Endorsed
Filed in the District Court, Territory of Alaska, 4th Div., Dec. 3, 1949.
/s/ John B. Hall,
Clerk.

In the District Court for the Territory of Alaska,
Fourth Division

Martha Cornelia Ross, Plaintiff, vs. The British Yukon Navigation Company, Ltd., a Corporation, Defendant.	No. 6129

NOTICE

To: Martha Cornelia Ross, plaintiff, and Bailey E. Bell, of counsel for plaintiff:

You are hereby notified that we have been informed by John B. Hall, Clerk of the District Court, Fourth Division, that the deposition of Charles Edward Baxter, Mrs. Marie McNair, John Cherry, Maurice Matwick, John Sirman, Mrs. Rose Sirman, Harry Beattie, and Herbert V. G. Wheeler, which were taken at Whitehorse, Yukon Territory, on the 18th day of November, 1949, have been filed with his office.

Plummer & Arnell,
By /s/ Raymond E. Plummer,
Attorneys for Defendant.
220 Central Building,
Box 499,
Anchorage, Alaska.

Service by receipt of a copy of the foregoing Notice is hereby acknowledged this 1st day of December, 1949.

Bailey E. Bell by beb jr.,
Of Counsel for Plaintiff.

Endorsed

Filed in the District Court, Territory of Alaska, 4th Div., May 10, 1950.

John B. Hall,
Clerk.

In the District Court for the Territory of Alaska,
Fourth Division

Martha Cornelia Ross, Plaintiff, vs. The British Yukon Navigation Company, Ltd., a Corporation, Defendant.	No. 6129

NOTICE OF TAXATION OF COSTS

To: Bailey E. Bell, of counsel for the above-named plaintiff:

Please take notice that the attached bill of costs in the above-entitled cause will be taxed before the Clerk of said Court at his office in Fairbanks on the 12th day of May, 1950, at 10:00 A.M. on said date.

Dated at Anchorage, Alaska, this 4th day of May, 1950.

Plummer & Arnell,
By /s/ Raymond E. Plummer,
Attorneys for Defendant.
220 Central Building,
Anchorage, Alaska.

Service of the foregoing Notice of Taxation of Costs by receipt of copy thereof acknowledged on this 4th day of May, 1950.

Bailey E. Bell, by MDB,
Of Attorneys for the Plaintiff.

In the District Court of the District of Alaska,
Fourth Judicial Division

United States of America,
District of Alaska
Fourth Judicial Division
} ss.

CERTIFICATE

I, JOHN B. HALL, Clerk of the District Court of the District of Alaska, Fourth Judicial Division, hereby certify that the foregoing and hereto attached six pages of typewritten matter, constitute a full, true, and complete copy, and the whole thereof, of the NOTICE OF TAKING DEPOSITION to Herman H. Ross & Bailey E. Bell re taking depositions of Matevick, et al.; NOTICE to Herman H. Ross & Bailey E. Bell re depositions Baxter et al. on file Clerk's office; and NOTICE OF TAXATION OF COSTS in Cause No. 6113, entitled HERMAN H. ROSS, Plaintiff versus THE BRITISH YUKON NAVIGATION COMPANY, LTD., a Corporation, Defendant, AND NOTICE OF TAKING DEPOSITION to Martha Cornelia Ross & Bailey E. Bell re taking deposition of Keobke; NOTICE to Martha Cornelia Ross & Bailey E. Bell re deposition of Baxter et al. on file in Clerk's office; AND NOTICE OF TAXATION OF COSTS in Cause No. 6129, entitled MARTHA CORNELIA ROSS, Plaintiff versus THE BRITISH YUKON NAVIGATION COMPANY, LTD., a Corporation, Defendant.

IN WITNESS WHEREOF I have hereunto set my hand and seal of the above-entitled Court this 22nd day of January, 1951.

(Seal) JOHN B. HALL, Clerk,
By OLGA T. STEGER, Deputy.

No. 12544

United States
Court of Appeals
for the Ninth Circuit.

MATANUSKA VALLEY FARMERS COOPERATING ASSOCIATION, a Corporation,

Appellant,

vs.

C. R. MONAGHAN,

Appellee.

Transcript of Record
In Two Volumes

Volume I
(Pages 1 to 334)

Appeal from the District Court, Territory of Alaska, Third Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 12544

United States
Court of Appeals
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MATANUSKA VALLEY FARMERS COOPERATING ASSOCIATION, a Corporation,

Appellant,

vs.

C. R. MONAGHAN,

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

INDEX PAGE

INDEX PAGE

INDEX PAGE

INDEX PAGE

INDEX PAGE

INDEX PAGE

NAMES AND ADDRESSES OF ATTORNEYS

GEORGE B. GRIGSBY,
201 Central Bldg.,
Anchorage, Alaska,

Attorney for the Plaintiff.

EDWARD V. DAVIS,

WILLIAM W. RENFREW,
Anchorage, Alaska,

Attorneys for the Defendant and Petitioner.

In the District Court for the Territory of Alaska,
Third Division

No. A-4252

C. R. MONAGHAN,

Plaintiff,

vs.

MATANUSKA VALLEY FARMERS COOPERATING ASSOCIATION, a corporation,

Defendant.

COMPLAINT

Comes now the plaintiff in the above-entitled action and complaining against the defendant herein, for cause of action alleges:

I.

That the Matanuska Valley Farmers Cooperating Association, formerly known as Matanuska Valley Farmers Cooperative Association, is a corporation, organized and doing business under and by virtue of the laws of the Territory of Alaska, and was at all times hereinafter mentioned engaged in the business of buying, selling, handling and processing agricultural products on a cooperative basis with its stockholders and members, at or near Palmer, Alaska.

II.

That the plaintiff is and was at all times hereinafter mentioned a stockholder and member of the said Matanuska Valley Farmers cooperating Asso-

ciation and engaged in the dairy business near Palmer, Alaska, and during the period beginning December 1st, 1944, and ending November 30th, 1945, and for a long time prior thereto, sold his milk product to the said defendant under and according to the terms of a written contract theretofore entered into between plaintiff and defendant. A true copy of said contract, except that the signatures of plaintiff and defendant and the date thereof are omitted therefrom, is hereunto annexed, marked "Exhibit A," and made a part of this complaint.

III.

That in accordance with the provisions of paragraphs 5 and 6 of said contract, the defendant elected to and did, during all the period beginning December 1st, 1944, and ending November 30th, 1945, pool and co-mingle the milk sold and delivered by plaintiff to defendant, with the milk sold and delivered to defendant by other dairymen, who were during all of said period stockholders and members of the defendant corporation, and resold the said milk and milk products thereof as thus co-mingled.

IV.

That during the period beginning December 1st, 1944, and ending November 30th, 1945, plaintiff sold and delivered to defendant 119,488 lbs. of Grade A milk for which defendant promised and agreed to pay plaintiff according to the provisions of paragraphs 6 and 7 of the said contract, that is to say, an amount representing plaintiff's interest in all

milk and milk product resold by defendant with which plaintiff's milk was pooled and co-mingled, and the proceeds thereof, after making deductions to cover the items mentioned and stated in paragraph 7 of the said contract. That the defendant pooled and co-mingled the milk so as aforesaid sold and delivered to defendant by plaintiff, with the milk sold and delivered to defendant by others, and resold the same; that by reason of the premises there became due and owing to plaintiff from defendant on the ..... day of....., 1946, after deduction of the items stated in paragraph 7 of said contract, the sum of $3,285.04.

That plaintiff has frequently demanded of defendant the payment of said sum, but defendant has failed, neglected and refused to pay the same or any part thereof and the same is still due, owing and unpaid together with interest according to law.

And for a Second Cause of Action, plaintiff alleges:

I.

That the Matanuska Valley Farmers Cooperating Association is a corporation, organized and doing business under and by virtue of the laws of the Territory of Alaska, and was at the times hereinafter mentioned engaged in the business of buying, selling, handling and processing agricultural products on a cooperative basis with its stockholders and members, at or near Palmer, Alaska.

II.

That one Frank McAllister is and was at all times

hereinafter mentioned a stockholder and member of the said Matanuska Valley Farmers Cooperating Association and engaged in the dairy business near Palmer, Alaska, and during the period beginning December 1st, 1944, and ending November 30th, 1945, and for a long time prior thereto, sold his milk product to the said defendant under and according to the terms of a written contract theretofore entered into between the said Frank McAllister and defendant. A true copy of said contract, except that the signatures of the said Frank McAllister and defendant are omitted therefrom, is hereunto annexed, marked "Exhibit A," and made a part of this complaint.

III.

That in accordance with the provision of paragraphs 5 and 6 of said contract, the defendant elected to and did, during all the period beginning December 1st, 1944, and ending November 30th, 1945, pool and co-mingle the milk sold and delivered by the said Frank McAllister to defendant, with the milk sold and delivered to defendant by other dairymen, who were during all of said period stockholders and members of the defendant corporation, and resold the said milk and milk products thereof as thus co-mingled.

IV.

That during the period beginning December 1st, 1944, and ending November 30th, 1945, the said Frank McAllister sold and delivered to defendant 168,842 lbs. of Grade A milk for which defendant

promised and agreed to pay the said Frank McAllister according to the provisions of paragraphs 6 and 7 of the said contract, that is to say, an amount representing the said Frank McAllister's interest in all milk and milk product resold by defendant with which the said Frank McAllister's milk was pooled and co-mingled, and the proceeds thereof, after making deductions to cover the items mentioned and stated in paragraph 7 of the said contract. That the defendant pooled and co-mingled the milk so as aforesaid sold and delivered to defendant by the said Frank McAllister, with the milk sold and delivered to defendant by others, and resold the same; that by reason of the premises there became due and owing to the said Frank McAllister from defendant on the ..... day of ....., 1946, after deduction of the items stated in paragraph 7 of said contract, the sum of $4,497.30.

V.

That heretofore and prior to commencement of this action, the said Frank McAllister, for a valuable consideration, assigned his aforesaid claim against the said defendant to this plaintiff, and plaintiff is now the owner and holder thereof.

That plaintiff has frequently demanded of defendant, the payment of the aforesaid sum of $4,497.30, but said defendant has failed, neglected, and refused to pay the same or any part thereof, and the same is still due, owing, and unpaid, together with interest according to law.

And for a Third Cause of Action, plaintiff alleges:

I.

That the Matanuska Valley Farmers Cooperating Association is a corporation, organized and doing business under and by virtue of the laws of the Territory of Alaska, and was at the times hereinafter mentioned engaged in the business of buying, selling, handling and processing agricultural products on a cooperative basis with its stockholders and members, at or near Palmer, Alaska.

II.

That one Merle L. Anderson is and was at all times hereinafter mentioned a stockholder and member of the said Matanuska Valley Farmers Cooperating Association and engaged in the dairy business near Palmer, Alaska, and during the period beginning December 1st, 1944, and ending November 30th, 1945, and for a long time prior thereto, sold his milk product to the said defendant under and according to the terms of a written contract theretofore entered into between the said Merle L. Anderson and defendant. A true copy of said contract, except that the signatures of the said Merle L. Anderson and defendant are omitted therefrom, is hereunto annexed, marked "Exhibit A" and made a part of this complaint.

III.

That in accordance with the provision of paragraphs 5 and 6 of said contract, the defendant elected to and did, during all the period beginning

December 1st, 1944, and ending November 30th, 1945, pool and co-mingle the milk sold and delivered by the said Merle L. Anderson to defendant, with the milk sold and delivered to defendant by other dairymen, who were during all of said period stockholders and members of the defendant corporation, and resold the said milk and milk products thereof as thus co-mingled.

IV.

That during the period beginning December 1st, 1944, and ending November 30th, 1945, the said Merle L. Anderson sold and delivered to defendant 130,910 lbs. of Grade A milk and 8,657 lbs. of Grade B milk for which defendant promised and agreed to pay the said Merle L. Anderson according to the provisions of paragraphs 6 and 7 of the said contract, that is to say, an amount representing the said Merle L. Anderson's interest in all milk and milk product resold by defendant with which the said Merle L. Anderson's milk was pooled and co-mingled, and the proceeds thereof, after making deductions to cover the items mentioned and stated in paragraph 7 of the said contract. That the defendant pooled and co-mingled the milk so as aforesaid sold and delivered to defendant by the said Merle L. Anderson, with the milk sold and delivered to defendant by others, and resold the same; that by reason of the premises there became due and owing to the said Merle L. Anderson from defendant on the ..... day of ....., 1946, after deduction of the items stated in paragraph 7 of said contract, the sum of $3,969.78.

V.

That heretofore and prior to commencement of this action, the said Merle L. Anderson, for a valuable consideration, assigned his aforesaid claim against the said defendant to this plaintiff, and plaintiff is now the owner and holder thereof.

That plaintiff has frequently demanded of defendant, the payment of the aforesaid sum of $3,-969.78, but said defendant has failed, neglected, and refused to pay the same or any part thereof, and the same is still due, owing, and unpaid, together with interest according to law.

And for a Fourth Cause of Action, plaintiff alleges:

I.

That the Matanuska Valley Farmers Cooperating Association is a corporation, organized and doing business under and by virtue of the laws of the Territory of Alaska, and was at the times hereinafter mentioned engaged in the business of buying, selling, handling and processing agricultural products on a cooperative basis with its stockholders and members, at or near Palmer, Alaska.

II.

That one A. A. Rempel is and was at all times hereinafter mentioned a stockholder and member of the said Matanuska Valley Farmers Cooperative Association and engaged in the dairy business near Palmer, Alaska, and during the period beginning December 1st, 1944, and ending November 30th, 1945, and for a long time prior thereto, sold his milk

product to the said defendant under and according to the terms of a written contract theretofore entered into between the said A. A. Rempel and defendant. A true copy of said contract, except that the signatures of the said A. A. Rempel and defendant are omitted therefrom, is hereunto annexed, marked "Exhibit A" and made a part of this complaint.

III.

That in accordance with the provision of paragraphs 5 and 6 of said contract, the defendant elected to and did, during all the period beginning December 1st, 1944, and ending November 30th, 1945, pool and co-mingle the milk sold and delivered by the said A. A. Rempel to defendant, with the milk sold and delivered to defendant by other dairymen, who were during all of said period stockholders and members of the defendant corporation, and resold the said milk and milk products thereof as thus co-mingled.

IV.

That during the period beginning December 1st, 1944, and ending November 30th, 1945, the said A. A. Rempel sold and delivered to defendant 48,925 lbs. of Grade A milk for which defendant promised and agreed to pay the said A. A. Rempel according to the provisions of paragraphs 6 and 7 of the said contract, that is to say, an amount representing the said A. A. Rempel's interest in all milk and milk product resold by defendant with which the said A. A. Rempel's milk was

pooled and co-mingled, and the proceeds thereof, after making deductions to cover the items mentioned and stated in paragraph 7 of the said contract. That the defendant pooled and co-mingled the milk so as aforesaid sold and delivered to defendant by the said A. A. Rempel, with the milk sold and delivered to defendant by others, and resold the same; that by reason of the premises there became due and owing to the said A. A. Rempel from the defendant on the ..... day of ....., 1946, after deduction of the items stated in paragraph 7 of said contract, the sum of $1,040.14.

V.

That heretofore and prior to commencement of this action, the said A. A. Rempel, for a valuable consideration, assigned his aforesaid claim against the said defendant to this plaintiff, and plaintiff is now the owner and holder thereof.

That plaintiff has frequently demanded of defendant, the payment of the aforesaid sum of $1,040.14, but said defendant has failed, neglected, and refused to pay the same or any part thereof, and the same is still due, owing, and unpaid, together with interest according to law.

And for a Fifth Cause of Action, plaintiff alleges:

I.

That the Matanuska Valley Farmers Cooperating Association is a corporation, organized and doing business under and by virtue of the Laws of the

Territory of Alaska, and was at all time hereinafter mentioned engaged in the business of buying, selling, handling and processing agricultural products on a cooperative basis with its stockholders and members, at or near Palmer, Alaska.

II.

That one Arvid Johnson is and was at all times hereinafter mentioned a stockholder and member of the said Matanuska Valley Farmers Cooperating Association and engaged in the Dairy business near Palmer, Alaska, and during the period beginning December 1st, 1944, and ending November 30th, 1945, and for a long time prior thereto, sold his milk product to the said defendant under and according to the terms of a written contract theretofore entered into between the said Arvid Johnson and defendant. A true copy of said contract, except that the date thereof and the signatures of the parties thereto are omitted therefrom, is hereunto annexed, marked "Exhibit A," and made a part of this complaint.

III.

That in accordance with the provisions of paragraphs 5 and 6 of said contract, the defendant elected to and did, during all the period beginning December 1st, 1944, and ending November 30th, 1945, pool and co-mingle the milk sold and delivered by the said Arvid Johnson to defendant, with the milk sold and delivered to defendant by other dairymen, who were during all of said period

stockholders and members of the defendant corporation, and resold the said milk and milk products thereof as thus co-mingled.

IV.

That during the period beginning December 1st, 1944, and ending November 30th, 1945, the said Arvid Johnson sold and delivered to defendant 95,567 lbs. of Grade A milk, for which defendant promised and agreed to pay the said Arvid Johnson according to the provisions of paragraphs 6 and 7 of the said contract, that is to say, an amount representing the said Arvid Johnson's interest in all milk product resold by defendant with which the said Arvid Johnson's milk was pooled and co-mingled, and the proceeds thereof, after making deductions to cover the items mentioned and stated in paragraph 7 of the said contract. That the defendant pooled and co-mingled the milk so as aforesaid sold and delivered to defendant by the said Arvid Johnson, with the milk sold and delivered to defendant by others, and resold the same; that by reason of the premises there became due and owing to the said Arvid Johnson from the defendant on the ..... day of ....., 1946, after deduction of the items stated in paragraph 7 of said contract, the sum of $2,686.54.

V.

That heretofore and prior to commencement of this action, the said Arvid Johnson, for a valuable consideration, assigned his aforesaid claim against

the said defendant to this plaintiff, and plaintiff is now the owner and holder thereof.

That plaintiff has frequently demanded of defendant, the payment of the aforesaid sum of $2,686.54, but said defendant has failed, neglected, and refused to pay the same or any part thereof, and the same is still due, owing, and unpaid, together with interest according to law.

And for a Sixth Cause of Action, plaintiff alleges:

I.

That the Matanuska Valley Farmers Cooperating Association is a corporation, organized and doing business under and by virtue of the Laws of the Territory of Alaska, and was at all times hereinafter mentioned engaged in the business of buying, selling, handling and processing agricultural products on a cooperative basis with its stockholders and members, at or near Palmer, Alaska.

II.

That one Jack Cope is and was at all times hereinafter mentioned a stockholder and member of the said Matanuska Valley Farmers Cooperating Association and engaged in the dairy business near Palmer, Alaska, and during the period beginning December 1st, 1944, and ending November 30th, 1945, and for a long time prior thereto, sold his milk product to the said defendant under and according to the terms of a written contract theretofore entered into between the said Jack Cope and defendant. A true copy of said contract, except

that the date thereof and the signatures of the parties thereto are omitted therefrom, is hereunto annexed, marked "Exhibit A," and made a part of this complaint.

III.

That in accordance with the provisions of paragraphs 5 and 6 of said contract, the defendant elected to and did, during all the period beginning December 1st, 1944, and ending November 30th, 1945, pool and co-mingle the milk sold and delivered by the said Jack Cope to defendant, with the milk sold and delivered to defendant by other dairymen, who were during all of said period stockholders and members of the defendant corporation, and resold the said milk and milk products thereof as thus co-mingled.

IV.

That during the period beginning December 1st, 1944, and ending November 30th, 1945, the said Jack Cope sold and delivered to the defendant 67,321 lbs. of Grade A milk, for which defendant promised and agreed to pay the said Jack Cope according to the provisions of paragraphs 6 and 7 of the said contract, that is to say, an amount representing the said Jack Cope's interest in all milk product resold by defendant with which the said Jack Cope's milk was pooled and co-mingled, and the proceeds thereof, after making deductions to cover the items mentioned and stated in paragraph 7 of the said contract. That the defendant pooled and co-mingled the milk so as aforesaid

sold and delivered to defendant by the said Jack Cope, with the milk sold and delivered to defendant by others, and resold the same; that by reason of the premises there became due and owing to the said Jack Cope from the defendant on the ..... day of ....., 1946, after deduction of the items stated in paragraph 7 of said contract, the sum of $1,897.02.

V.

That heretofore and prior to commencement of this action, the said Jack Cope, for a valuable consideration, assigned his aforesaid claim against the said defendant to this plaintiff, and plaintiff is now the owner and holder thereof.

That plaintiff has frequently demanded of defendant, the payment of the aforesaid sum of $1,897.02, but said defendant has failed, neglected, and refused to pay the same or any part thereof, and the same is still due, owing, and unpaid, together with interest according to law.

And for a Seventh Cause of Action, plaintiff alleges:

I.

That the Matanuska Valley Farmers Cooperating Association is a corporation, organized and doing business under and by virtue of the Laws of the Territory of Alaska, and was at all time hereinafter mentioned engaged in the business of buying, selling, handling and processing agricultural products on a cooperative basis with its stockholders and members, at or near Palmer, Alaska.

II.

That one William Ising is and was at all times hereinafter mentioned a stockholder and member of the said Matanuska Valley Farmers Cooperating Association and engaged in the dairy business near Palmer, Alaska, and during the period beginning December 1st, 1944, and ending November 30th, 1945, and for a long time prior thereto, sold his milk product to the said defendant under and according to the terms of a written contract theretofore entered into between the said William Ising and defendant. A true copy of said contract, except that the date thereof and the signatures of the parties thereto are omitted therefrom, is hereunto annexed, marked "Exhibit A," and made a part of this complaint.

III.

That in accordance with the provisions of paragraphs 5 and 6 of said contract, the defendant elected to and did, during all the period beginning December 1st, 1944, and ending November 30th, 1945, pool and co-mingle the milk sold and delivered by the said William Ising to defendant, with the milk sold and delivered to defendant by other dairymen, who were during all of said period stockholders and members of the defendant corporation, and resold the said milk and milk products thereof as thus co-mingled.

IV.

That during the period beginning December 1st, 1944, and ending November 30th, 1945, the said

William Ising sold and delivered to the deefndant 85,157 lbs. of Grade A milk, for which defendant promised and agreed to pay the said William Ising according to the provisions of paragraphs 6 and 7 of the said contract, that is to say, an amount representing the said William Ising's interest in all milk product resold by defendant with which the said William Ising's milk was pooled and co-mingled, and the proceeds thereof, after making deductions to cover the items mentioned and stated in paragraph 7 of the said contract. That the defendant pooled and co-mingled the milk so as aforesaid sold and delivered to defendant by the said William Ising, with the milk sold and delivered to defendant by others, and resold the same; that by reason of the premises there became due and owing to the said William Ising from the defendant on the ..... day of ....., 1946, after deduction of the items stated in paragraph 7 of said contract, the sum of $2,356.84.

V.

That heretofore and prior to commencement of this action, the said William Ising, for a valuable consideration, assigned his aforesaid claim against the said defendant to this plaintiff, and plaintiff is now the owner and holder thereof.

That plaintiff has frequently demanded of defendant, the payment of the aforesaid sum of $2,-356.84, but said defendant has failed, neglected, and refused to pay the same or any part thereof, and the same is still due, owing, and unpaid, together with interest according to law.

And for an Eighth Cause of Action, plaintiff alleges:

I.

That the Matanuska Valley Farmers Cooperating Association is a corporation, organized and doing business under and by virtue of the Laws of the Territory of Alaska, and was at all times hereinafter mentioned engaged in the business of buying, selling, handling and processing agricultural products on a cooperative basis with its stockholders and members, at or near Palmer, Alaska.

II.

That one Joseph Lentz is and was at all times hereinafter mentioned a stockholder and member of the said Matanuska Valley Farmers Cooperating Association and engaged in the dairy business near Palmer, Alaska, and during the period beginning December 1st, 1944, and ending November 30th, 1945, and for a long time prior thereto, sold his milk product to the said defendant under and according to the terms of a written contract theretofore entered into between the said Joseph Lentz and defendant. A true copy of said contract, except that the date thereof and the signatures of the parties thereto are omitted therefrom, is hereunto annexed, marked "Exhibit A," and made a part of this complaint.

III.

That in accordance with the provisions of paragraphs 5 and 6 of said contract, the defendant elected to and did, during all the period beginning

December 1st, 1944, and ending November 30th, 1945, pool and co-mingle the milk sold and delivered by the said Joseph Lentz to defendant, with the milk sold and delivered to defendant by other dairymen, who were during all of said period stockholders and members of the defendant corporation, and resold the said milk and milk products thereof as thus co-mingled.

IV.

That during the period beginning December 1st, 1944, and ending November 30th, 1945, the said Joseph Lentz sold and delivered to the defendant 42,856 lbs. of Grade A milk, for which defendant promised and agreed to pay the said Joseph Lentz according to the provisions of paragraphs 6 and 7 of the said contract, that is to say, an amount representing the said Joseph Lentz's interest in all milk product resold by defendant with which the said Joseph Lentz's milk was pooled and co-mingled, and the proceeds thereof, after making deductions to cover the items mentioned and stated in paragraph 7 of the said contract. That the defendant pooled and co-mingled the milk so as aforesaid sold and delivered to defendant by the said Joseph Lentz, with the milk sold and delivered to defendant by others, and resold the same; that by reason of the premises there became due and owing to the said Joseph Lentz from the defendant on the ..... day of ....., 1946, after deduction of the items stated in paragraph 7 of said contract, the sum of $1,201.92.

V.

That heretofore and prior to commencement of this action, the said Joseph Lentz, for a valuable consideration, assigned his aforesaid claim against the said defendant to this plaintiff, and plaintiff is now the owner and holder thereof.

That plaintiff has frequently demanded of defendant, the payment of the aforesaid sum of $1,-201.92, but said defendant has failed, neglected, and refused to pay the same or any part thereof, and the same is still due, owing, and unpaid, together with interest according to law.

And for a Ninth Cause of Action, plaintiff alleges:

I.

That the Matanuska Valley Farmers Cooperating Association is a corporation, organized and doing business under and by virtue of the Laws of the Territory of Alaska, and was at all times hereinafter mentioned engaged in the business of buying, selling, handling and processing agricultural products on a cooperative basis with its stockholders and members, at or near Palmer, Alaska.

II.

That one Clarence Quarnstrom is and was at all times hereinafter mentioned a stockholder and member of the said Matanuska Valley Farmers Cooperating Association and engaged in the dairy business near Palmer, Alaska, and during the period beginning December 1st, 1944, and ending November 30th, 1945, and for a long time prior thereto, sold his

milk product to the said defendant under and according to the terms of a written contract, theretofore entered into between the said Clarence Quarnstrom and defendant. A true copy of said contract, except that the date thereof and the signatures of the parties thereto are omitted therefrom, is hereunto annexed, marked "Exhibit A," and made a part o fthis complaint.

III.

That in accordance with the provisions of paragraphs 5 and 6 of said contract, the defendant elected to and did, during all the period beginning December 1st, 1944, and ending November 30th, 1945, pool and co-mingle the milk sold and delivered by the said Clarence Quarnstrom to defendant, with the milk sold and delivered to defendant by other dairymen, who were during all of said period stockholders and members of the defendant corporation, and resold the said milk and milk products thereof as thus co-mingled.

That during the period beginning December 1st, 1944, and ending November 30th, 1945, the said Clarence Quarnstrom sold and delivered to the defendant 33,595 lbs. of Grade A milk, for which defendant promised and agreed to pay the said Clarence Quarnstrom according to the provisions of paragraphs 6 and 7 of the said contract, that is to say, an amount representing the said Clarence Quarnstrom's interest in all milk product resold by defenadnt with which the said Clarence Quarnstrom's milk was pooled and co-mingled, and the

proceeds thereof, after making deductions to cover the items mentioned and stated in paragraph 7 of the said contract. That the defendant pooled and co-mingled the milk so as aforesaid sold and delivered to defendant by the said Clarence Quarnstrom, with the milk sold and delivered to defendant by others, and resold the same; that by reason of the premises there became due and owing to the said Clarence Quarnstrom from the defendant on the ..... day of ....., 1946, after deduction of the items stated in paragraph 7 of said contract, the sum of $1,095.37.

V.

That heretofore and prior to commencement of this action, the said Clarence Quarnstrom, for a valuable consideration, assigned his aforesaid claim against the said defendant to this plaintiff, and plaintiff is now the owner and holder thereof.

That plaintiff has frequently demanded of defendant, the payment of the aforesaid sum of $1,095.37, but said defendant has failed, neglected, and refused to pay the same or any part thereof, and the same is still due, owing, and unpaid, together with interest according to law.

And for a Tenth Cause of Action, plaintiff alleges:

I.

That the Matanuska Valley Farmers Cooperating Association is a corporation, organized and doing business under and by virtue of the Laws of the Territory of Alaska, and was at all times herein-

after mentioned engaged in the business of buying, selling, handling and processing agricultural products on a cooperative basis with its stockholders and members, at or near Palmer, Alaska.

II.

That one Thomas Moffit is and was at all times hereinafter mentioned a stockholder and member of the said Matanuska Valley Farmers Cooperating Association and engaged in the dairy business near Palmer, Alaska, and during the period beginning December 1st, 1944, and ending November 30th, 1945, and for a long time prior thereto, sold his milk product to the said defendant under and according to the terms of a written contract, theretofore entered into between the said Thomas Moffit and defendant. A true copy of said contract, except that the date thereof and the signatures of the parties thereto are omitted therefrom, is hereunto annexed, marked "Exhibit A," and made a part of this complaint.

III.

That in accordance with the provisions of paragraphs 5 and 6 of said contract, the defendant elected to and did, during all the period beginning December 1st, 1944, and ending November 30th, 1945, pool and co-mingle the milk sold and delivered by the said Thomas Moffiet to defendant, with the milk sold and delivered to defendant by other dairymen, who were during all of said period stockholders and members of the defendant corporation,

and resold the said milk and milk products thereof as thus co-mingled.

IV.

That during the period beginning December 1st, 1944, and ending November 30th, 1945, the said Thomas Moffit sold and delivered to the defendant 81,451 lbs. of Grade A milk and 1,601 lbs. of Grade B milk, for which defendant promised and agreed to pay the said Thomas Moffit according to the provisions of paragraphs 6 and 7 of the said contract, that is to say, an amount representing the said Thomas Moffit's interest in all milk product resold by defendant with which the said Thomas Moffit's milk was pooled and co-mingled, and the proceeds thereof, after making deductions to cover the items mentioned and stated in paragraph 7 of the said contract. That the defendant pooled and co-mingled the milk so as aforesaid sold and delivered to defendant by the said Thomas Moffit, with the milk sold and delivered to defendant by others, and resold the same; that by reason of the premises there became due and owing to the said Thomas Moffit from the defendant on the ..... day of ....., 1946, after deduction of the items stated in paragraph 7 of said contract, the sum of $2,274.08.

V.

That heretofore and prior to commencement of this action, the said Thomas Moffit, for a valuable consideration, assigned his aforesaid claim against

the said defendant to this plaintiff, and plaintiff is now the owner and holder thereof.

That plaintiff has frequently demanded of defendant, the payment of the aforesaid sum of $2,-274.08, but said defendant has failed, neglected, and refused to pay the same or any part thereof, and the same is still due, owing, and unpaid, together with interest according to law.

And for an Eleventh Cause of Action, plaintiff alleges:

I.

That the Matanuska Valley Farmers Cooperating Association is a corporation, organized and doing business under and by virtue of the Laws of the Territory of Alaska, and was at all times hereinafter mentioned engaged in the business of buying, selling, handling and processing agricultural products on a cooperative basis with its stockholders and members, at or near Palmer, Alaska.

II.

That one Paul Nelson is and was at all times hereinafter mentioned a stockholder and member of the said Matanuska Valley Farmers Cooperating Association and engaged in the dairy business near Palmer, Alaska, and during the period beginning December 1st, 1944, and ending November 30th, 1945, and for a long time prior thereto, sold his milk product to the said defendant under and according to the terms of a written contract, theretofore entered into between the said Paul Nelson

and defendant. A true copy of said contract, except that the date thereof and the signatures of the parties thereto are omitted therefrom, is hereunto annexed, marked "Exhibit A," and made a part of this complaint.

III.

That in accordance with the provisions of paragraphs 5 and 6 of said contract, the defendant elected to and did, during all the period beginning December 1st, 1944, and ending November 30th, 1945, pool and co-mingle the milk sold and delivered by the said Paul Nelson to defendant, with the milk sold and delivered to defendant by other dairymen, who were during all of said period stockholders and members of the defendant corporation, and resold the said milk and milk products thereof as thus co-mingled.

IV.

That during the period beginning December 1st, 1944, and ending November 30th, 1945, the said Paul Nelson sold and delivered to the defendant 36,170 lbs. of Grade B milk, for which defendant promised and agreed to pay the said Paul Nelson according to the provisions of paragraphs 6 and 7 of the said contract, that is to say, an amount representing the said Paul Nelson's interest in all milk product resold by defendant with which the said Paul Nelson's milk was pooled and co-mingled, and the proceeds thereof, after making deductions to cover the items mentioned and stated in paragraph 7 of the said contract. That the defendant pooled and co-mingled the milk so as aforesaid

sold and delivered to defendant by the said Paul Nelson, with the milk sold and delivered to defendant by others, and resold the same; that by reason of the premises there became due and owing to the said Paul Nelson from the defendant on the ..... day of ....., 1946, after deduction of the items stated in paragraph 7 of said contract, the sum of $822.57.

V.

That heretofore and prior to commencement of this action, the said Paul Nelson, for a valuable consideration, assigned his aforesaid claim against the said defendant to this plaintiff, and plaintiff is now the owner and holder thereof.

That plaintiff has frequently demanded of defendant, the payment of the aforesaid sum of $822.57, but said defendant has failed, neglected, and refused to pay the same or any part thereof, and the same is still due, owing, and unpaid, together with interest according to law.

And for a Twelfth Cause of Action, plaintiff alleges:

I.

That the Matanuska Valley Farmers Cooperating Association is a corporation, organized and doing business under and by virtue of the laws of the Territory of Alaska, and was at all times hereinafter mentioned engaged in the business of buying, selling, handling and processing agricultural products on a cooperative basis with its stockholders and members, at or near Palmer, Alaska.

II.

That one B. J. Lossing is and was at all times hereinafter mentioned a stockholder and member of the said Matanuska Valley Farmers Cooperating Association and engaged in the dairy business near Palmer, Alaska, and during the period beginning December 1st, 1944, and ending November 30th, 1945, and for a long time prior thereto, sold his milk product to the said defendant under and according to the terms of a written contract, theretofore entered into between the said B. J. Lossing and defendant. A true copy of said contract, except that the date thereof and the signatures of the parties thereto are omitted therefrom, is hereunto annexed, marked "Exhibit A," and made a part of this complaint.

III.

That in accordance with the provisions of paragraphs 5 and 6 of said contract, the defendant elected to and did, during all the period beginning December 1st, 1944, and ending November 30th, 1945, pool and co-mingle the milk sold and delivered by the said B. J. Lossing to defendant, with the milk sold and delivered to defendant by other dairymen, who were during all of said period stockholders and members of the defendant corporation, and resold the said milk and milk products thereof as thus co-mingled.

IV.

That during the period beginning December 1st, 1944, and ending November 30th, 1945, the said

B. J. Lossing sold and delivered to the defendant 52,053 lbs. of Grade A milk, for which defendant promised and agreed to pay the said B. J. Lossing according to the provisions of paragraphs 6 and 7 of the said contract, that is to say, an amount representing the said B. J. Lossing's interest in all milk product resold by defendant with which the said B. J. Lossing's milk was pooled and co-mingled, and the proceeds thereof, after making deductions to cover the items mentioned and stated in paragraph 7 of the said contract. That the defendant pooled and co-mingled the milk so as aforesaid sold and delivered to defendant by the said B. J. Lossing, with the milk sold and delivered to defendant by others, and resold the same; that by reason of the premises there became due and owing to the said B. J. Lossing from the defendant on the ..... day of ....., 1946, after deduction of the items stated in paragraph 7 of said contract, the sum of $1,400.28.

V.

That heretofore and prior to commencement of this action, the said B. J. Lossing, for a valuable consideration, assigned his aforesaid claim against the said defendant to this plaintiff, and plaintiff is now the owner and holder thereof.

That plaintiff has frequently demanded of defendant, the payment of the aforesaid sum of $1,400.28, but said defendant has failed, neglected, and refused to pay the same or any part thereof, and the same is still due, owing, and unpaid, together with interest according to law.

And for a Thirteenth Cause of Action, plaintiff alleges:

I.

That the Matanuska Valley Farmers Cooperating Association is a corporation, organized and doing business under and by virtue of the Laws of the Territory of Alaska, and was at all times hereinafter mentioned engaged in the business of buying, selling, handling and processing agricultural products on a cooperative basis with its stockholders and members, at or near Palmer, Alaska.

II.

That one Chet Liebing is and was at all times hereinafter mentioned a stockholder and member of the said Matanuska Valley Farmers Cooperating Association and engaged in the dairy business near Palmer, Alaska, and during the period beginning December 1st, 1944, and ending November 30th, 1945, and for a long time prior thereto, sold his milk product to the said defendant under and according to the terms of a written contract, theretofore entered into between the said Chet Liebing and defendant. A true copy of said contract, except that the date thereof and the signatures of the parties thereto are omitted therefrom, is hereunto annexed, marked "Exhibit A," and made a part of this complaint.

III.

That in accordance with the provisions of paragraphs 5 and 6 of said contract, the defendant elected to and did, during all the period beginning

December 1st, 1944, and ending November 30th, 1945, pool and co-mingle the milk sold and delivered by the said Chet Liebing to defendant, with the milk sold and delivered to defendant by other dairymen, who were during all of said period stockholders and members of the defendant corporation, and resold the said milk and milk products thereof as thus co-mingled.

IV.

That during the period beginning December 1st, 1944, and ending November 30th, 1945, the said Chet Leibing sold and delivered to the defendant 1,475 lbs. of Grade A milk and 36,557 lbs. of Grade B milk, for which defendant promised and agreed to pay the said Chet Liebing according to the provisions of paragraphs 6 and 7 of the said contract, that is to say, an amount representing the said Chet Liebing's interest in all milk product resold by defendant with which the said Chet Liebing's milk was pooled and co-mingled, and the proceeds thereof, after making deductions to cover the items mentioned and stated in paragraph 7 of the said contract. That the defendant pooled and co-mingled the milk so as aforesaid sold and delivered to defendant by the said Chet Liebing, with the milk sold and delivered to defendant by others, and resold the same; that by reason of the premises there became due and owing to the said Chet Liebing from the defendant on the ..... day of ...., 1946, after deduction of the items stated in paragraph 7 of said contract, the sum of $948.19.

V.

That heretofore and prior to commencement of this action, the said Chet Liebing, for a valuable consideration, assigned his aforesaid claim against the said defendant to this plaintiff, and plaintiff is now the owner and holder thereof.

That plaintiff has frequently demanded of defendant, the payment of the aforesaid sum of $948.19, but said defendant has failed, neglected, and refused to pay the same or any part thereof, and the same is still due, owing, and unpaid, together with interest according to law.

And for a Fourteenth Cause of Action, plaintiff alleges:

I.

That the Matanuska Valley Farmers Cooperating Association is a corporation, organized and doing business under and by virtue of the Laws of the Territory of Alaska, and was at all times hereinafter mentioned engaged in the business of buying, selling, handling and processing agricultural product on a cooperative basis with its stockholders and members, at or near Palmer, Alaska.

II.

That one Alvin J. Collier is and was at all times hereinafter mentioned a stockholder and member of the said Matanuska Valley Farmers Cooperating Association and engaged in the dairy business near Palmer, Alaska, and during the period beginning December 1st, 1944, and ending November 30th,

December 1st, 1944, and ending November 30th, 1945, pool and co-mingle the milk sold and delivered by the said Chet Liebing to defendant, with the milk sold and delivered to defendant by other dairymen, who were during all of said period stockholders and members of the defendant corporation, and resold the said milk and milk products thereof as thus co-mingled.

IV.

That during the period beginning December 1st, 1944, and ending November 30th, 1945, the said Chet Leibing sold and delivered to the defendant 1,475 lbs. of Grade A milk and 36,557 lbs. of Grade B milk, for which defendant promised and agreed to pay the said Chet Liebing according to the provisions of paragraphs 6 and 7 of the said contract, that is to say, an amount representing the said Chet Liebing's interest in all milk product resold by defendant with which the said Chet Liebing's milk was pooled and co-mingled, and the proceeds thereof, after making deductions to cover the items mentioned and stated in paragraph 7 of the said contract. That the defendant pooled and co-mingled the milk so as aforesaid sold and delivered to defendant by the said Chet Liebing, with the milk sold and delivered to defendant by others, and resold the same; that by reason of the premises there became due and owing to the said Chet Liebing from the defendant on the ..... day of ...., 1946, after deduction of the items stated in paragraph 7 of said contract, the sum of $948.19.

V.

That heretofore and prior to commencement of this action, the said Chet Liebing, for a valuable consideration, assigned his aforesaid claim against the said defendant to this plaintiff, and plaintiff is now the owner and holder thereof.

That plaintiff has frequently demanded of defendant, the payment of the aforesaid sum of $948.19, but said defendant has failed, neglected, and refused to pay the same or any part thereof, and the same is still due, owing, and unpaid, together with interest according to law.

And for a Fourteenth Cause of Action, plaintiff alleges:

I.

That the Matanuska Valley Farmers Cooperating Association is a corporation, organized and doing business under and by virtue of the Laws of the Territory of Alaska, and was at all times hereinafter mentioned engaged in the business of buying, selling, handling and processing agricultural product on a cooperative basis with its stockholders and members, at or near Palmer, Alaska.

II.

That one Alvin J. Collier is and was at all times hereinafter mentioned a stockholder and member of the said Matanuska Valley Farmers Cooperating Association and engaged in the dairy business near Palmer, Alaska, and during the period beginning December 1st, 1944, and ending November 30th,

1945, and for a long time prior thereto, sold his milk product to the said defendant under and according to the terms of a written contract, theretofore entered into between the said Alvin J. Collier and defendant. A true copy of said contract, except that the date thereof and the signatures of the parties thereto are omitted therefrom, is hereunto annexed, marked "Exhibit A," and made a part of this complaint.

III.

That in accordance with the provisions of paragraphs 5 and 6 of said contract, the defendant elected to and did, during all the period beginning December 1st, 1944, and ending November 30th, 1945, pool and co-mingle the milk sold and delivered by the said Alvin J. Collier to defendant, with the milk sold and delivered to defendant by other dairymen, who were during all of said period stockholders and members of the defendant corporation, and resold the said milk and milk products thereof as thus co-mingled.

IV.

That during the period beginning December 1st, 1944, and ending November 30th, 1945, the said Alvin J. Collier sold and delivered to the defendant 9,851 lbs. of Grade B milk, for which defendant promised and agreed to pay the said Alvin J. Collier according to the provisions of paragraphs 6 and 7 of the said contract, that is to say, an amount representing the said Alvin J. Coller's interest in all milk product resold by defendant with which the said

Alvin J. Collier's milk was pooled and co-mingled, and the proceeds thereof, after making deductions to cover the items mentioned and stated in paragraph 7 of the said contract. That the defendant pooled and co-mingled the milk so as aforesaid sold and delivered to defendant by the said Alvin J. Collier, with the milk sold and delivered to defendant by others, and resold the same; that by reason of the premises there became due and owing to the said Alvin J. Collier, from the defendant on the ..... day of ....., 1946, after deduction of the items stated in paragraph 7 of said contract, the sum of $238.06.

V.

That heretofore and prior to commencement of this action, the said Alvin J. Collier, for a valuable consideration, assigned his aforesaid claim against the said defendant to this plaintiff, and plaintiff is now the owner and holder thereof.

That plaintiff has frequently demanded of defendant, the payment of the aforesaid sum of $238.06, but said defendant has failed, neglected, and refused to pay the same or any part thereof, and the same is still due, owing, and unpaid, together with interest according to law.

And for a Fifteenth Cause of Action, plaintiff alleges:

I.

That the Matanuska Valley Farmers Cooperating Association is a corporation, organized and doing

business under and by virtue of the Laws of the Territory of Alaska, and was at all times hereinafter mentioned engaged in the business of buying, selling, handling and processing agricultural products on a cooperative basis with its stockholders and members, at or near Palmer, Alaska.

II.

That one William Lentz is and was at all times hereinafter mentioned a stockholder and member of the said Matanuska Valley Farmers Cooperating Association and engaged in the dairy business near Palmer, Alaska, and during the period beginning December 1st, 1944, and ending November 30th, 1945, and for a long time prior thereto, sold his milk product to the said defendant under and according to the terms of a written contract, theretofore entered into between the said William Lentz and defendant. A true copy of said contract, except that the date thereof and the signatures of the parties thereto are omitted therefrom, is hereunto annexed, marked "Exhibit A," and made a part of this complaint.

III.

That in accordance with the provisions of paragraphs 5 and 6 of said contract, the defendant elected to and did, during all the period beginning December 1st, 1944, and ending November 30th, 1945, pool and co-mingle the milk sold and delivered by the said William Lentz to defendant, with the milk sold and delivered to defendant by other dairymen, who were during all of said period stockhold-

ers and members of the defendant corporation, and resold the said milk and milk products thereof as thus co-mingled.

IV.

That during the period beginning December 1st, 1944, and ending November 30th, 1945, the said William Lentz sold and delivered to the defendant 58,303 lbs. of Grade A milk and 4,219 lbs. of Grade B milk, for which defendant promised and agreed to pay the said William Lentz according to the provisions of paragraphs 6 and 7 of the said contract, that is to say, an amount representing the said William Lentz's interest in all milk product resold by defendant with which the said William Lentz's milk was pooled and co-mingled, and the proceeds thereof, after making deductions to cover the items mentioned and stated in paragraph 7 of the said contract. That the defendant pooled and co-mingled the milk so as aforesaid sold and delivered to defendant by the said William Lentz, with the milk sold and delivered to defendant by others, and resold the same; that by reason of the premises there became due and owing to the said William Lentz, from the defendant on the ..... day of ....., 1946, after deduction of the items stated in paragraph 7 of said contract, the sum of $1,711.25.

V.

That heretofore and prior to commencement of this action, the said William Lentz, for a valuable

consideration, assigned his aforesaid claim against the said defendant to this plaintiff, and plaintiff is now the owner and holder thereof.

That plaintiff has frequently demanded of defendant, the payment of the aforesaid sum of $1,-711.25, but said defendant has failed, neglected, and refused to pay the same or any part thereof, and the same is still due, owing, and unpaid, together with interest according to law.

And for a Sixteenth Cause of Action, plaintiff alleges:

I.

That the Matanuska Valley Farmers Cooperating Association is a corporation, organized and doing business under and by virtue of the Laws of the Territory of Alaska, and was at all times hereinafter mentioned engaged in the business of buying, selling, handling and processing agricultural products on a cooperative basis with its stockholders and members, at or near Palmer, Alaska.

II.

That one Henning Benson is and was at all times hereinafter mentioned a stockholder and member of the said Matanuska Valley Farmers Cooperating Association and engaged in the dairy business near Palmer, Alaska, and during the period beginning December 1st, 1944, and ending November 30th, 1945, and for a long time prior thereto, sold his milk product to the said defendant under and according to the terms of a written contract, thereto-

fore entered into between the said Henning Benson and defendant. A true copy of said contract, except that the date thereof and the signatures of the parties thereto are omitted therefrom, is hereunto annexed, marked "Exhibit A," and made a part of this complaint.

III.

That in accordance with the provisions of paragraphs 5 and 6 of said contract, the defendant elected to and did, during all the period beginning December 1st, 1944, and ending November 30th, 1945, pool and co-mingle the milk sold and delivered by the said Henning Benson to defendant, with the milk sold and delivered to defendant by other dairymen, who were during all of said period stockholders and members of the defendant corporation, and resold the said milk and milk products thereof as thus co-mingled.

IV.

That during the period beginning December 1st, 1944, and ending November 30th, 1945, the said Henning Benson sold and delivered to the defendant 32,299 lbs. of Grade B milk, for which defendant promised and agreed to pay the said Henning Benson according to the provisions of paragraphs 6 and 7 of the said contract, that is to say, an amount representing the said Henning Benson's interest in all milk product resold by defendant with which the said Henning Benson's milk was pooled and co-mingled, and the proceeds thereof, after making deductions to cover the items mentioned and stated in paragraph 7 of the said contract. That the de-

fendant pooled and co-mingled the milk so as aforesaid sold and delivered to defendant by the said Henning Benson, with the milk sold and delivered to defendant by others, and resold the same; that by reason of the premises there became due and owing to the said Henning Benson, from the defendant on the ..... day of ....., 1946, after deduction of the items stated in paragraph 7 of said contract, the sum of $723.41.

V.

That heretofore and prior to commencement of this action, the said Henning Benson, for a valuable consideration, assigned his aforesaid claim against the said defendant to this plaintiff, and plaintiff is now the owner and holder thereof.

That plaintiff has frequently demanded of defendant, the payment of the aforesaid sum of $723.41, but said defendant has failed, neglected, and refused to pay the same or any part thereof, and the same is still due, owing, and unpaid, together with interest according to law.

And for a Seventeenth Cause of Action, plaintiff alleges:

I.

That the Matanuska Valley Farmers Cooperating Association is a corporation, organized and doing business under and by virtue of the Laws of the Territory of Alaska, and was at all times hereinafter mentioned engaged in the business of buying, selling, handling and processing agricultural prod-

ucts on a cooperative basis with its stockholders and members, at or near Palmer, Alaska.

II.

That one Walter C. Huntley is and was at all times hereinafter mentioned a stockholder and member of the said Matanuska Valley Farmers Cooperating Association and engaged in the dairy business near Palmer, Alaska, and during the period beginning December 1st, 1944, and ending November 30th, 1945, and for a long time prior thereto, sold his milk product to the said defendant under and according to the terms of a written contract, theretofore entered into between the said Walter C. Huntley and defendant. A true copy of said contract, except that the date thereof and the signatures of the parties thereto are omitted therefrom, is hereunto annexed, marked "Exhibit A," and made a part of this complaint.

III.

That in accordance with the provisions of paragraphs 5 and 6 of said contract, the defendant elected to and did, during all the period beginning December 1st, 1944, and ending November 30th, 1945, pool and co-mingle the milk sold and delivered by the said Walter C. Huntley to defendant, with the milk sold and delivered to defendant by other dairymen, who were during all of said period stockholders and members of the defendant corporation, and resold the said milk and milk products thereof as thus co-mingled.

IV.

That during the period beginning December 1st, 1944, and ending November 30th, 1945, the said Walter C. Huntley sold and delivered to the defendant 32,236 lbs. of Grade A milk, for which defendant promised and agreed to pay the said Walter C. Huntley according to the provisions of paragraphs 6 and 7 of the said contract, that is to say, an amount representing the said Walter C. Huntley's interest in all milk product resold by defendant with which the said Walter C. Huntley's milk was pooled and co-mingled, and the proceeds thereof, making deductions to cover the items mentioned and stated in paragraph 7 of the said contract. That the defendant pooled and co-mingled the milk so as aforesaid sold and delivered to defendant by the said Walter C. Huntley, with the milk sold and delivered to defendant by others, and resold the same; that by reason of the premises there became due and owing to the said Walter C. Huntley, from the defendant on the ..... day of ...., 1946, after deduction of the items stated in paragraph 7 of said contract, the sum of $942.23.

V.

That heretofore and prior to commencement of this action, the said Walter C. Huntley, for a valuable consideration, assigned his aforesaid claim against the said defendant to this plaintiff, and plaintiff is now the owner and holder thereof.

That plaintiff has frequently demanded of de-

fendant, the payment of the aforesaid sum of $942.23, but said defendant has failed, neglected, and refused to pay the same or any part thereof, and the same is still due, owing, and unpaid, together with interest according to law.

And for an Eighteenth Cause of Action, plaintiff alleges:

I.

That the Matanuska Valley Farmers Cooperating Association is a corporation, organized and doing business under and by virtue of the Laws of the Territory of Alaska, and was at all times hereinafter mentioned engaged in the business of buying, selling, handling and processing agricultural products on a cooperative basis with its stockholders and members, at or near Palmer, Alaska.

II.

That one Lawrence Plumley is and was at all times hereinafter mentioned a stockholder and member of the said Matanuska Valley Farmers Cooperating Association and engaged in the dairy business near Palmer, Alaska, and during the period beginning December 1st, 1944, and ending November 30th, 1945, and for a long time prior thereto, sold his milk product to the said defendant under and according to the terms of a written contract, theretofore entered into between the said Lawrence Plumley and defendant. A true copy of said contract, except that the date thereof and the signatures of the parties thereto are omitted therefrom, is hereunto annexed, marked "Exhibit A," and made a part of this complaint.

III.

That in accordance with the provisions of paragraphs 5 and 6 of said contract, the defendant elected to and did, during all the period beginning December 1st, 1944, and ending November 30th, 1945, pool and co-mingle the milk sold and delivered by the said Lawrence Plumley to defendant, with the milk sold and delivered to defendant by other dairymen, who were during all of said period stockholders and members of the defendant corporation, and resold the said milk and milk products thereof as thus co-mingled.

IV.

That during the period beginning December 1st, 1944, and ending November 30th, 1945, the said Lawrence Plumley sold and delivered to the defendant 15,790 lbs. of Grade A milk, for which defendant promised and agreed to pay the said Lawrence Plumley according to the provisions of paragraphs 6 and 7 of the said contract, that is to say, an amount representing the said Lawrence Plumley's interest in all milk product resold by defendant with which the said Lawrence Plumley's milk was pooled and co-mingled, and the proceeds thereof, after making deductions to cover the items mentioned and stated in paragraph 7 of the said contract. That the defendant pooled and co-mingled the milk so as aforesaid sold and delivered to defendant by the said Lawrence Plumley, with the milk sold and delivered to defendant by others, and resold the same; that by reason of the premises

there became due and owing to the said Lawrence Plumley, from the defendant on the ..... day of ....., 1946, after deduction of the items stated in paragraph 7 of said contract, the sum of $358.56.

V.

That heretofore and prior to commencement of this action, the said Lawrence Plumley, for a valuable consideration, assigned his aforesaid claim against the said defendant to this plaintiff, and plaintiff is now the owner and holder thereof.

That plaintiff has frequently demanded of defendant, the payment of the aforesaid sum of $358.56, but said defendant has failed, neglected, and refused to pay the same or any part thereof, and the same is still due, owing, and unpaid, together with interest according to law.

And for a Nineteenth Cause of Action, plaintiff alleges:

I.

That the Matanuska Valley Farmers Cooperating Association is a corporation, organized and doing business under and by virtue of the Laws of the Territory of Alaska, and was at all times hereinafter mentioned engaged in the business of buying, selling, handling and processing agricultural products on a cooperative basis with its stockholders and members, at or near Palmer, Alaska.

II.

That one H. S. Bauer is and was at all times

hereinafter mentioned a stockholder and member of the said Matanuska Valley Farmers Cooperating Association and engaged in the dairy business near Palmer, Alaska, and during the period beginning December 1st, 1944, and ending November 30th, 1945, and for a long time prior thereto, sold his milk product to the said defendant under and according to the terms of a written contract, theretofore entered into between the said H. S. Bauer and defendant. A true copy of said contract, except that the date thereof and the signatures of the parties thereto are omitted therefrom, is hereunto annexed, marked "Exhibit A," and made a part of this complaint.

III.

That in accordance with the provisions of paragraphs 5 and 6 of said contract, the defendant elected to and did, during all the period beginning December 1st, 1944, and ending November 30th, 1945, pool and co-mingle the milk sold and delivered by the said H. S. Bauer to defendant, with the milk sold and delivered to defendant by other dairymen, who were during all of said period stockholders and members of the defendant corporation, and resold the said milk and milk products thereof as thus co-mingled.

IV.

That during the period beginning December 1st, 1944, and ending November 30th, 1945, the said H. S. Bauer sold and delivered to the defendant 6,196 lbs. of Grade B milk, for which defendant

promised and agreed to pay the said H. S. Bauer according to the provisions of paragraphs 6 and 7 of the said contract, that is to say, an amount representing the said H. S. Bauer's interest in all milk product resold by defendant with which the said H. S. Baurer's milk was pooled and co-mingled, and the proceeds thereof, after making deductions to cover the items mentioned and stated in paragraph 7 of the said contract. That the defendant pooled and co-mingled the milk so as aforesaid sold and delivered to defendant by the said H. S. Bauer, with the milk sold and delivered to defendant by others, and resold the same; that by reason of the premises there became due and owing to the said H. S. Bauer, from the defendant on the ..... day of ....., 1946, after deduction of the items stated in paragraph 7 of said contract, the sum of $147.69.

V.

That heretofore and prior to commencement of this action, the said H. S. Bauer, for a valuable consideration, assigned his aforesaid claim against the said defendant to this plaintiff, and plaintiff is now the owner and holder thereof.

That plaintiff has frequently demanded of defendant, the payment of the aforesaid sum of $147.69, but said defendant has failed, neglected, and refused to pay the same or any part thereof, and the same is still due, owing, and unpaid, together with interest according to law.

And for a Twentieth Cause of Action, plaintiff alleges:

I.

That the Matanuska Valley Farmers Cooperating Association is a corporation organized and doing business under and by virtue of the Laws of the Territory of Alaska, and was at all times hereinafter mentioned engaged in the business of buying, selling, handling and processing agricultural products on a cooperative basis with its stockholders and members, at or near Palmer, Alaska.

II.

That one A. R. Moffitt is and was at all times hereinafter mentioned a stockholder and member of the said Matanuska Valley Farmers Cooperating Association and engaged in the dairy business near Palmer, Alaska, and during the period beginning December 1st, 1944, and ending November 30th, 1945, and for a long time prior thereto, sold his milk product to the said defendant under and according to the terms of a written contract, theretofore entered into between the said A. R. Moffitt and defendant. A true copy of said contract, except that the date thereof and the signatures of the parties thereto are omiited therefrom, is hereunto annexed, marked "Exhibit A," and made a part of this complaint.

III.

That in accordance with the provisions of paragraphs 5 and 6 of said contract, the defendant elected to and did, during all the period beginning

December 1st, 1944, and ending November 30th, 1945, pool and co-mingle the milk sold and delivered by the said A. R. Moffitt to defendant, with the milk sold and delivered to defendant by other dairymen, who were during all of said period stockholders and members of the defendant corporation, and resold the said milk and milk products thereof as thus co-mingled.

IV.

That during the period beginning December 1st, 1944, and ending November 30th, 1945, the said A. R. Moffitt sold and delivered to the defendant 63,949 lbs. of Grade A milk, for which defendant promised and agreed to pay the said A. R. Moffitt according to the provisions of paragraphs 6 and 7 of the said contract, that is to say, an amount representing the said A. R. Moffitt's interest in all milk product resold by defendant with which the said A. R. Moffitt's milk was pooled and co-mingled, and the proceeds thereof, after making deductions to cover the items mentioned and stated in paragraph 7 of the said contract. That the defendant pooled and co-mingled the milk so as aforesaid sold and delivered to defendant by the said A. R. Moffitt, with the milk sold and delivered to defendant by others, and resold the same; that by reason of the premises there became due and owing to the said A. R. Moffitt from the defendant on the ..... day of ....., 1946, after deduction of the items stated in paragraph 7 of said contract, the sum of $1,851.00.

the said Leonard Bergan's milk was pooled and co-mingled, and the proceeds thereof, after making deductions to cover the items mentioned and stated in paragraph 7 of the said contract. That the defendant pooled and co-mingled the milk so as aforesaid sold and delivered to defendant by the said Leonard Bergan, with the milk sold and delivered to defendant by others, and resold the same; that by reason of the premises there became due and owing to the said Leonard Bergan from the defendant on the .. day of ....., 1946, after deduction of the items stated in paragraph 7 of said contract, the sum of $66.10.

V.

That heretofore and prior to commencement of this action, the said Leonard Bergan, for a valuable consideration, assigned his aforesaid claim against the said defendant to this plaintiff and plaintiff is now the owner and holder thereof.

That plaintiff has frequently demanded of defendant, the payment of the aforesaid sum of $66.10, but said defendant has failed, neglected, and refused to pay the same or any part thereof, and the same is still due, owing, and unpaid, together with interest according to law.

And for a Twenty-Second Cause of Action, plaintiff alleges:

I.

That the Matanuska Valley Farmers Cooperating Association is a corporation organized and doing

business under and by virtue of the Laws of the Territory of Alaska, and was at all times hereinafter mentioned engaged in the business of buying, selling, handling and processing agricultural products on a cooperative basis with its stockholders and members, at or near Palmer, Alaska.

II.

That one Harold Thuma is and was at all times hereinafter mentioned a stockholder and member of the said Matanuska Valley Farmers Cooperating Association and engaged in the dairy business near Palmer, Alaska, and during the period beginning December 1st, 1944, and ending November 30th, 1945, and for a long time prior thereto, sold his milk product to the said defendant under and according to the terms of a written contract, theretofore entered into between the said Harold Thuma and defendant. A true copy of said contract, except that the date thereof and the signatures of the parties thereto are omitted therefrom, is hereunto annexed, marked "Exhibit A," and made a part of this complaint.

III.

That in accordance with the provisions of paragraphs 5 and 6 of said contract, the defendant elected to and did, during all the period beginning December 1st, 1944, and ending November 30th, 1945, pool and co-mingle the milk sold and delivered by the said Harold Thuma to defendant, with the milk sold and delivered to defendant by other dairy-

men, who were during all of said period stockholders and members of the defendant corporation, and resold the said milk and milk products thereof as thus co-mingled.

IV.

That during the period beginning December 1st, 1944, and ending November 30th, 1945, the said Harold Thuma sold and delivered to the defendant 23,004 lbs. of Grade B milk, for which defendant promised and agreed to pay the said Harold Thuma according to the provisions of paragraphs 6 and 7 of the said contract, that is to say, an amount representing the said Harold Thuma's interest in all milk product resold by defendant with which the said Harold Thuma's milk was pooled and co-mingled, and the proceeds thereof, after making deductions to cover the items mentioned and stated in paragraph 7 of the said contract. That the defendant pooled and co-mingled the milk so as aforesaid sold and delivered to defendant by the said Harold Thuma, with the milk sold and delivered to defendant by others, and resold the same; that by reason of the premises there became due and owing to the said Harold Thuma from the defendant on the .. day of ....., 1946, after deduction of the items stated in paragraph 7 of said contract the sum of $551.86.

V.

That heretofore and prior to commencement of this action, the said Harold Thuma, for a valuable consideration, assigned his aforesaid claim against

the said defendant to this plaintiff and plaintiff is now the owner and holder thereof.

That plaintiff has frequently demanded of defendant, the payment of the aforesaid sum of $551.86, but said defendant has failed, neglected, and refused to pay the same or any part thereof, and the same is still due, owing, and unpaid, together with interest according to law.

Wherefor, plaintiff demands judgment as follows:

On his first cause of action, for the sum of $3,285.04, with interest thereon at the rate of 6% per annum from the .. day of ....., 1946.

On his second cause of action, for the sum of $4,497.30, with interest thereon at the rate of 6% per annum from the .. day of ....., 1946.

On his third cause of action, for the sum of $3,969.78, with interest thereon at the rate of 6% per annum from the .. day of ....., 1946.

On his fourth cause of action, for the sum of $1,040.14, with interest thereon at the rate of 6% per annum from the .. day of ....., 1946.

On his fifth cause of action, for the sum of $2,686.54, with interest thereon at the rate of 6% per annum from the .. day of ....., 1946.

On his sixth cause of action, for the sum of $1,897.02, with interest thereon at the rate of 6% per annum from the .. day of ....., 1946.

On his seventh cause of action, for the sum of $2,356.84, with interest thereon at the rate of 6% per annum from the .. day of ....., 1946.

On his eighth cause of action, for the sum of $1,201.92, with interest thereon at the rate of 6% per annum from the .. day of ....., 1946.

On his ninth cause of action, for the sum of $1,095.37, with interest thereon at the rate of 6% per annum from the .. day of ....., 1946.

On his tenth cause of action, for the sum of $2,274.08, with interest thereon at the rate of 6% per annum from the .. day of ....., 1946.

On his eleventh cause of action, for the sum of $822.57, with interest thereon at the rate of 6% per annum from the .. day of ....., 1946.

On his twelfth cause of action, for the sum of $1,400.28, with interest thereon at the rate of 6% per annum from the .. day of ....., 1946.

On his thirteenth cause of action, for the sum of $948.19, with interest thereon at the rate of 6% per annum from the .. day of ....., 1946.

On his fourteenth cause of action, for the sum of $238.06, with interest thereon at the rate of 6% per annum from the .. day of ....., 1946.

On his fifteenth cause of action, for the sum of $1,711.25, with interest thereon at the rate of 6% per annum from the .. day of ....., 1946.

On his sixteenth cause of action, for the sum of

$723.41, with interest thereon at the rate of 6% per annum from the .. day of ....., 1946.

On his seventeenth cause of action, for the sum of $942.23, with interest thereon at the rate of 6% per annum from the .. day of ....., 1946.

On his eighteenth cause of action for the sum of $358.56, with interest thereon at the rate of 6% per annum from the .. day of ....., 1946.

On his nineteenth cause of action for the sum of $147.69, with interest thereon at the rate of 6% per annum from this .. day of ....., 1946.

On his twentieth cause of action for the sum of $1851.00 with interest thereon at the rate of 6% per annum from the .. day of ....., 1946.

On his twenty-first cause of action for the sum of $66.10 with interest thereon at the rate of 6% per annum from the .. day of ....., 1946.

On his twenty-second cause of action for the sum of $551.86 with interest thereon at the rate of 6% per annum from the .. day of ....., 1946.

And for his costs and disbursements herein.

/s/ GEORGE B. GRIGSBY,
Attorney for Plaintiff.

United States of America,
Territory of Alaska—ss.

George B. Grigsby being first duly sworn deposes and says: That he is the attorney for the plaintiff

in the above-entitled action, that he has read the foregoing complaint and knows the contents thereof and that the same is true as he verily believes. That this verification is made by affiant as attorney for the plaintiff and not by the plaintiff for the reason that plaintiff is not in Anchorage, Alaska, where this verification is made, at the time of the making thereof, but is at said time, and resides in or near Palmer, Alaska.

/s/ GEORGE B. GRIGSBY.

Subscribed and sworn to before me this 20th day of September, 1946.

[Seal] /s/ B. J. GROVER,
Notary Public in and for the
Territory of Alaska.

My Commission Expires March 25, 1948.

EXHIBIT A

MATANUSKA VALLEY FARMERS COOPERATIVE ASSOCIATION

Member's Standard Marketing Contract

This contract between Matanuska Valley Farmers Cooperative Association, hereinafter called the Association and the undersigned, hereinafter, called the Producer, Witnesseth:

Whereas, the Matanuska Valley Colonization Project has been established by the corporation in the Matanuska Valley of Alaska as a Rural Com-

munity by the aid of funds granted by the Government of the United States through the Federal Emergency Relief Administration in pursuance of public policy for the public purpose of assisting the Territory of Alaska in some of its rural rehabilitation problems and making it possible for worthy and qualified persons to acquire for themselves and families on suitable tracts of land in Alaska on small long time payment terms not procurable through ordinary commercial channels and thereby obtain employment and gainful living in agricultural and allied activities and enjoy the benefits of said Rural Community under properly controlled conditions on a cooperative basis in accordance with adequate standards of American citizenship; and

Whereas, this Association has been chartered by the Territory of Alaska under the sponsorship of the Alaska Rural Rehabilitation Corporation in order to assist in carrying said policies and purposes forward for the public welfare and for the benefit of those living in the area of said Project and the neighborhood thereof, and the Alaska Rural Rehabilitation Corporation has by separate contract with the Association agreed to lend it financial assistance, afford it adequate physical facilities and act as its Management and Sales Agency and otherwise assist the Association to successfully conduct its operations for the benefit of its members until it is self supporting and able to carry on its affairs with its own resources and

Whereas, the Producer is engaged in the pro-

duction of agricultural products in said area and desires the benefits of membership in the Association;

Now Therefore, in consideration of the above-premises and the mutual covenants herein contained It Is Agreed as Follows:

(1) The Producer hereby subscribes for one share of stock in the Association at five (5.00) dollars, its par value, and agrees to be governed by the Articles of Incorporation of the Association, its By-laws and all rules, regulations, and directions from time to time prescribed by the Association or its duly authorized officers and agencies covering production, marketing and sale of agricultural products and purchase of supplies, commodities and services on a cooperative basis and other cooperative activities, and by so doing and by entering into this Contract hereby becomes a member of the Association.

(2) The Association buys and the Producer sells to the Association all agricultural products produced or raised by or for him or acquired by him as landlord or lessor, except such as he reserves for his own home, farm or other personal use and which is not for sale, and agrees to deliver the same in marketable condition at such times and places and with such markings of identification as the Association or its Management and Sales Agency shall direct. This Contract is intended by the parties hereto to pass an absolute title to all said agricultural products as soon as the same have a potential existence, but they shall be at the risk of the Pro-

ducer until delivery hereunder, except dairy products and except livestock accepted for resale, and title to these does not pass until delivery thereof hereunder. The Association has the legal power and is hereby authorized by the Producer, at its discretion, at any time it deems it necessary in order to protect its rights, under the title which passes hereby as aforesaid, to enter the premises where said agricultural products are produced, grown or located and deal with the same as its own in every respect. The Association, by a statement in writing only, may authorize the Producer to sell or dispose of the agricultural products covered by said written statement outside of the Association at any time and for such period of time as conditions are such that in the judgment of the Association the handling of said products would not be advantageous to the Association or the Producer and provide in the same written statement for the non-acceptance of delivery of said products by the Association or its Management and Sales Agency.

(3) It is mutually agreed that the term "agricultural products" as used herein includes horticultural, viticultural, forestry, dairy, poultry, bee and farm and ranch products and also includes such livestock raised for the market as the Association accepts for resale.

(4) The Association agrees that upon delivery of agricultural products hereunder it may make or cause to be made through its Management and

Sales Agency such requested advances to the Producer on said products as in its discretion may be justified by the Producer's immediate needs and by marketing conditions.

(5) The Association agrees to receive, handle by inspecting, assembling, sorting, grading, packing, preserving, canning or otherwise processing, storing, advertising, transporting and other services necessary to prepare for market and sale and to market and resell agricultural products delivered hereunder, together with like products delivered by other members either separately or co-mingled or pooled at its discretion and to pay therefor as set forth in this Contract or cause the same to be done through its Management and Sales Agency.

(6) Producer agrees that the Association may establish or cause to be established through its Management and Sales Agency daily, weekly, monthly, seasonal, yearly, and/or other pools by grades of any agricultural products received from its members and may co-mingle or pool any of the products delivered hereunder with other like products delivered by others or cause same to be done and remit or cause to be remitted to the Producer and other producers concerned, on the basis of the interest of each one therein, as payments in full for the products delivered by them and sold in said pool, the net average price received therefor after making the deductions provided for in this Contract with the object of causing all members whose products are sold therein to receive the same price for products of the same grade.

(7) The Association agrees to pay or cause to be paid through its Management and Sales Agency to the Producer the amounts received for the said resale of said products sold separately or the amounts representing Producer's interest in products resold wherein his products are pooled or co-mingled with others as provided for in Paragraph 6 herein after making deductions to cover the following items in connection therewith: (a) repayment of advances made to Producer under Paragraph 4 of this Contract and interest on said advances; (b) reasonable charges for the services of receiving, handling and selling said agricultural products under Paragraph 5 of this Contract; (c) operating and maintenance expenses; (d) one dollar each year in payment of the official publication of the Association in case said publication is issued; (e) two per centum (2%) of the gross sales price received for the products of said member sold separately or of the amounts representing said member's interest in products sold wherein his products are pooled or co-mingled with others as funds belonging to the Association to meet its indebtedness and additional expenses, contribute to the Association's reserves (with which to acquire ownership of industries and enterprises and property in connection therewith and for other proper purposes), to pay interest on capital stock by way of dividends and for other proper purposes as provided for by the laws of Alaska pertaining to "Cooperative Associations" under which the Asso-

ciation has been incorporated and by the By-laws of the Association.

(8) The Association is hereby authorized to process or manufacture into changed or new products the products delivered hereunder and pay the Producer as provided for in Paragraph 7, from the proceeds from resale of the changed or new products or at its discretion to pay a flat delivery price therefor to the Producer as full payment thereof and thereafter process or manufacture it into changed or new products on its own account and at its own expense as its own product and sell and retain the full proceeds thereof as amounts belonging to the Association.

(9) The Association shall make or cause to be made through its Management and Sales Agency rules and regulations and provisions for inspectors or graders to inspect and to standardize and grade agricultural products and the methods of handling and shipping the same and the Producer agrees to accept and abide by any such rules and regulations and the inspection, grading and standardizing thus established, and that if any such agricultural products are not in proper condition for sale they shall be sorted and prepared for sale at the expense of the Producer, and if not marketable they may be rejected, and that any loss on account of inferior or damaged condition at delivery shall be charged against the Producer, individually.

(10) The Association is hereby authorized to

borrow money on the products delivered hereunder, and/or the by-products derived therefrom, and/or on any evidence of such products or by-products of amounts receivable arising therefrom and to pledge the same as the absolute owner thereof.

(11) The Producer agrees to purchase from the industries and enterprises operated by the Association or operated through its Management and Sales Agency all services and commodities needed by him including supplies, equipment and machinery, and not to purchase any of same elsewhere, except when the same are not for sale thereat and then not until first requesting the Association or its Management and Sales Agency to order the same and it being found by it impractical to do so and he so notified.

(12) The Association agrees that there shall be returned to Producer from the retail price received from him on all cash purchases semi-annually during the year of 1936 and and semi-annually every year thereafter as a patronage-purchase-savings the sum remaining after deducting from said retail price in connection with said cash purchases amounts to cover (a) cost to the Association of services or commodities purchased by the Producer; (b) reasonable charges for services of handling said services or commodities; (c) operating and maintenance expenses; (d) one-half of the amount remaining as funds belonging to the Association for Association obligations and reserve purposes as set forth in item (e) of deductions under Paragraph 7 herein

(except patronage-sales-refunds which are not paid hereunder; it being understood that the term "cash" as used herein includes payment in kind or toll or representation of cash by coupon, "bingle" or other symbol or device which has been paid for in cash by the Producer when duly authorized by the Association.

(13) The Association is hereby authorized by the Producer to add or cause to be added to the deductions listed in Paragraphs 7, 8 and 12 herein deductions of any amounts due the Association under the obligations of any of the paragraphs of this Contract or otherwise and to retain the same for payment thereof, but the failure of the Association to do so shall not be construed as a waiver of said obligations or said amounts due or the right of the Association to collect and receive the same by other measures.

(14) It is mutually understood that under cooperative principles the chief benefits to members of a cooperative association come from cooperative purchases on a cash basis in the form of reasonable prices and patronage-purchase-savings and that the expense of conducting business on a credit basis leaves no room for said savings and the By-laws prohibit patronage-purchase-savings on credit transactions and they will not be paid. It is also mutually understood that under the By-laws of the Association it is the policy of the Association to transact all cooperative purchase business on a cash basis to the fullest extent possible and to extend the

cash system as rapidly as possible over all said transactions and give all members of the Association the full benefit of patronage-purchase-savings thereunder and that credit purchases will be limited to purchases especially permitted by the Association where the situation, need and security justify it in cases of the more expensive commodities including heavy farm machinery, livestock, etc., and on no account will credit be extended for the purchase of non-necessities or luxuries. The Producer agrees to limit his requests for credit purposes to said situations and to neither make credit nor cash purchases elsewhere than from the Association industries and enterprises as provided for in Paragarph 11 hereof.

(15) Inasmuch as the remedy at law would be inadequate and inasmuch as it would be impracticable and extremely difficult to determine the actual damage resulting to the Association should the Producer fail to sell to or through the Association and its agencies and deliver his agricultural products accordingly or make his purchases of services and commodities therefrom as herein agreed to regardless of the cause of such failures, the Producer hereby agrees to pay to the Association for all agricultural products delivered or disposed of, by or for him, other than in accordance with the terms of this Contract, a sum equal to ten per cent of the price he received for the sale of said products and to suffer as a penalty for purchasing services or commodities outside of the Association in

breach of this Contract the cutting down of the amount of patronage-purchase-savings otherwise due him or the abolishment of the same altogether to such extent and for such periods of time as the Board of Directors may determine and the retention of said amounts by the Association as funds belonging to the Association, said penalties to serve as liquidated damages for breach of this Contract; all parties agreeing that this Contract is one of a series dependent for its true value upon the adherence of each and all of the contracting parties to each and all of the said contracts, but the cancellation of this Contract or the failure of Producer to comply therewith shall not effect other similar contracts; Provided that the power to assess said penalties or assessments thereof shall not preclude the Association from applying other measures for the protection of the Association and its members which are provided for by the By-laws and rules thereunder including suspension from membership from the Association.

(16) The Producer's obligations hereunder will be enforced in the courts by specific performance and injunction and the Producer agrees that if the Association brings any action whatsoever by reason of a breach or threatened breach hereof, the Producer shall pay all costs of court, costs for bonds and otherwise, expenses of travel and all expenses arising out of or caused by the litigation, and reasonable attorney fees expended or incurred by it in such proceedings and all such costs and expenses shall be included in the judgment.

(17) If there is a lien on any of the agricultural products delivered hereunder, Producer authorizes the Association to pay or cause to be paid through its Management and Sales Agency the holder of said lien from the sale of such agricultural products before any payment is made to Producer hereunder.

(18) In view of the common purpose of the Association and the Alaska Rural Rehabilitation Corporation as set forth on page 1 of this Contract in promoting gainful agricultural activities on the land and allied activities on the part of members of this Association and the Association's obligations to coordinate its efforts for the same objective with those of said Corporation as provided for in the Articles of Incorporation and By-laws of the Association the Producer agrees that while occupying a home financed by said Corporation on government or other land or while occupying homes on patented land under contract of land and home purchase from said Corporation or otherwise he will abide by all rules and regulations of said Corporation concerning the use of said lands for agricultural purposes.

(9) It is mutually understood that this Contract shall remain in full force and effect continuously hereafter, subject to legal limitations, if any, and cannot be altered or amended except upon authority of or vote of two thirds of all the members of the Association at an annual meeting or a special meeting of members called to consider the same after a

fifteen days notice in writing of the exact alterations or amendments proposed sent to the Producer and each member of the Association by the Secretary of the Association upon order of the Board of Directors of the Association upon petition of one-third of the members containing said proposed alterations or amendments and that no alteration or amendment can be made affecting uncompleted sales or transactions arising under this Contract or the Association's Contract with the Alaska Rural Rehabilitation Corporation referred to on Page 1 of this Contract or any of the Association's outstanding contracts with other third parties without their written consent duly authorized.

(20) The parties agree that there are no oral or other conditions, promises, covenants, representations, or inducements in addition to or at variance with any terms hereof and that this Contract represents the voluntary and clear understanding of both parties fully and completed.

(21) Misrepresentation on the part of any member of the Association or other person of the financial condition or standing of the Association or any attempts to induce any member of the Association to breach or violate the Member's Standard Marketing Contract (of which this is one) is in violation of the laws of Alaska and the Association reserves the right to protect the Association and its members by taking proper legal steps and measures should such violations occur.

(22) It is mutually agreed by the parties hereto that this Contract is binding on the successors and the assigns of the Association and that the obligations incurred by the Producer hereunder are binding upon his heirs, executors, administrators and assigns, provided however, that the Producer cannot assign this Contract or any of his interests therein without the consent of the Association. It is further mutually agreed that this Contract is subject to any Federal, State or Territorial laws now existing or which may be hereafter enacted.

Dated this ..... day of ....., 19.....

.....

(Producer)

Post Office Address.....

MATANUSKA VALLEY FARMERS COOPERATIVE ASSOCIATION

By .....

(President)

[Seal]

Attest:

.....

(Secretary)

Acknowledgment

(Of the Producer)

United States of America,
Territory of Alaska—ss.

Be It Remembered, that on this ..... day of ....., 19...., personally appeared

before me, the undersigned, a Notary Public, within and for the Territory of Alaska aforesaid.....
.....and being *just* duly sworn, stated that he is the person who signed the foregoing instrument and acknowledged the same to be executed by his free and voluntary act for the considerations, uses, and purposes therein provided, and that the facts therein stated are truly set forth.

In Testimony Whereof, I have hereunto set my hand and official seal this day and date above-written.

.....
(Notary Public)

Acknowledgment

(Of the Association)

United States of America,
Territory of Alaska—ss.

On this ..... day of ....., 19...., personally appeared before me, the undersigned, a Notary Public, within and for the Territory of Alaska aforesaid.....and
.....and being first duly sworn stated that they are the President and Secretary of the Matanuska Valley Cooperative Association, and were duly authorized in these respective capacities to execute the foregoing instrument for and in the name and behalf of said corporation and further stated and acknowledged that in pursuance of said authority they signed, executed and

delivered said foregoing instrument for the considerations, uses and purposes therein mentioned and set forth.

In Testimony Whereof, I have hereunto set my hand and official seal this day and date above-written.

.....
(Notary Public)

[Endorsed]: Filed September 20, 1946.

[Title of District Court and Cause.]

ANSWER

Comes now the Matanuska Valley Farmers Co-operating Association, a corporation, the above-named defendant, and by way of Answer to the first cause of plaintiff's Complaint admits, denies and alleges as follows:

I.

Defendant admits the allegations of the first and second paragraphs of plaintiff's first cause of action.

II.

Defendant denies each and all the allegations of the third paragraph of plaintiff's first cause of action except that defendant admits that milk sold and delivered by the plaintiff to the defendant was co-mingled with milk sold and delivered to the

defendant by other dairymen and that such other dairymen were stockholders and members of the defendant corporation.

III.

Defendant denies each and all of the allegations of the fourth paragraph of plaintiff's first cause of action save and except that defendant admits that during the period beginning December 1, 1944, and ending November 30, 1945, plaintiff sold and delivered to defendant 119,488 pounds of Grade A milk, that the defendant co-mingled the milk delivered by the plaintiff with other milk delivered by others.

As a further answer to plaintiff's first cause of action and by way of affirmative defense thereto defendant alleges as follows:

I.

That the milk sold and delivered by the plaintiff to the defendant between December 1, 1944 and November 30, 1945, was purchased by the defendant at a fixed price per hundred pounds of milk delivered, which price varied from time to time during the year and that the plaintiff has been paid in full by the defendant for all milk so purchased.

II.

That after making the deductions authorized by paragraphs 7, 8 and 12 of the marketing agreement the plaintiff has been fully paid by the defendant for all milk sold and delivered to the defendant by the plaintiff.

In answer to plaintiff's Second Cause of Action the defendant admits, denies and alleges as follows:

I.

Defendant admits the allegations of the first and second paragraphs of plaintiff's second cause of action.

II.

Defendant denies each and all the allegations of the third paragraph of plaintiff's second cause of action except that defendant admits that milk sold and delivered by Frank McAllister to the defendant was co-mingled with milk sold and delivered to the defendant by other dairymen and that such other dairymen were stockholders and members of the defendant corporation.

III.

Defendant denies each and all of the allegations of the fourth paragraph of plaintiff's second cause of action save and except that defendant admits that during the period beginning December 1, 1944, and ending November 30, 1945, Frank McAllister sold and delivered to defendant 168,842 pounds of Grade A milk, that the defendant co-mingled the milk delivered by Frank McAllister with other milk delivered by others.

IV.

That defendant has no knowledge or information sufficient to form a belief concerning the fifth paragraph of plaintiff's second cause of action and therefore denies the allegations thereof.

As a further answer to plaintiff's second cause of action and by way of affirmative defense thereto defendant alleges as follows:

I.

That the milk sold and delivered by Frank McAllister to the defendant between December 1, 1944, and November 30, 1945, was purchased by the defendant at a fixed price per hundred pounds of milk delivered, which price varied from time to time during the year and that Frank McAllister has been paid in full by the defendant for all milk so purchased.

II.

That after making the deductions authorized by paragraphs 7, 8 and 12 of the marketing agreement Frank McAllister has been fully paid by the defendant for all milk sold and delivered to the defendant by Frank McAllister.

In answer to plaintiff's Third Cause of Action the defendant admits, denies and alleges as follows:

I.

Defendant admits the allegations of the first and second paragraphs of plaintiff's third cause of action.

II.

Defendant denies each and all the allegations of the third paragraph of plaintiff's third cause of action except that defendant admits that milk sold and delivered by Merle L. Anderson to the de-

fendant was co-mingled with milk sold and delivered to the defendant by other dairymen and that such other dairymen were stockholders and members of the defendant corporation.

III.

Defendant denies each and all of the allegations of the fourth paragraph of plaintiff's third cause of action save and except that defendant admits that during the period beginning December 1, 1944, and ending November 30, 1945, Merle L. Anderson sold and delivered to defendant 130,910 pounds of Grade A milk, that the defendant co-mingled the milk delivered by Merle L. Anderson with other milk delivered by others.

IV.

That defendant has no knowledge or information sufficient to form a belief concerning the fifth paragraph of plaintiff's third cause of action and therefore denies the allegations thereof.

As a further answer to plaintiff's third cause of action and by way of affirmative defense thereto defendant alleges as follows:

I.

That the milk sold and delivered by Merle L. Anderson to the defendant between December 1, 1944, and November 30, 1945, was purchased by the defendant at a fixed price per hundred pounds of milk delivered, which price varied from time to time during the year and that Merle L. Anderson

has been paid in full by the defendant for all milk so purchased.

II.

That after making the deductions authorized by paragraphs 7, 8 and 12 of the marketing agreement Merle L. Anderson has been fully paid by the defendant for all milk sold and delivered to the defendant by Merle L. Anderson.

In answer to plaintiff's Fourth Cause of Action the defendant admits, denies and alleges as follows:

I.

Defendant admits the allegations of the first and second paragraphs of plaintiff's fourth cause of action.

II.

Defendant denies each and all the allegations of the third paragraph of plaintiff's fourth cause of action except that defendant admits that milk sold and delivered by A. A. Rempel to the defendant was co-mingled with milk sold and delivered to the defendant by other dairymen and that such other dairymen were stockholders and members of the defendant corporation.

III.

Defendant denies each and all of the allegations of the fourth paragraph of plaintiff's fourth cause of action save and except that defendant admits that during the period beginning December 1, 1944,

and ending November 30, 1945, A. A. Rempel sold and delivered to defendant 48,925 pounds of Grade A milk, that the defendant co-mingled the milk delivered by A. A. Rempel with other milk delivered by others. [Penciled in Margin]: Ungraded.

IV.

That defendant has no knowledge or information sufficient to form a belief concerning the fifth paragraph of plaintiff's fourth cause of action and therefore denies the allegations thereof.

As a further answer to plaintiff's fourth cause of action and by way of affirmative defense thereto defendant alleges as follows:

I.

That the milk sold and delivered by A. A. Rempel to the defendant between December 1, 1944, and November 30, 1945, was purchased by the defendant at a fixed price per hundred pounds of milk delivered, which price varied from time to time during the year and that A. A. Rempel has been paid in full by the defendant for all milk so purchased.

II.

That after making the deductions authorized by paragraphs 7, 8 and 12 of the marketing agreement A. A. Rempel has been fully paid by the defendant for all milk sold and delivered to the defendant by A. A. Rempel.

In answer to plaintiff's Fifth Cause of Action the defendant admits, denies and alleges as follows:

I.

Defendant admits the allegations of the first and second paragraphs of plaintiff's fifth cause of action.

II.

Defendant denies each and all the allegations of the third paragraph of plaintiff's fifth cause of action except that defendant admits that milk sold and delivered by Arvid Johnson to the defendant was co-mingled with milk sold and delivered to the defendant by other dairymen and that such other dairymen were stockholders and members of the defendant corporation.

III.

Defendant denies each and all of the allegations of the fourth paragraph of plaintiff's fifth cause of action save and except that defendant admits that during the period beginning December 1, 1944, and ending November 30, 1945, Arvid Johnson sold and delivered to defendant 95,567 pounds of Grade A milk, that the defendant co-mingled the milk delivered by Arvid Johnson with other milk delivered by others.

IV.

That defendant has no knowledge or information sufficient to form a belief concerning the fifth paragraph of plaintiff's fifth cause of action and therefore denies the allegations thereof.

As a further answer to plaintiff's fifth cause of action and by way of affirmative defense thereto defendant alleges as follows:

I.

That the milk sold and delivered by Arvid Johnson to the defendant between December 1, 1944, and November 30, 1945, was purchased by the defendant at a fixed price per hundred pounds of milk delivered, which price varied from time to time during the year and that Arvid Johnson has been paid in full by the defendant for all milk so purchased.

II.

That after making the deductions authorized by paragraphs 7, 8 and 12 of the marketing agreement Arvid Johnson has been fully paid by the defendant for all milk sold and delivered to the defendant by Arvid Johnson.

In answer to plaintiff's Sixth Cause of Action the defendant admits, denies and alleges as follows:

I.

Defendant admits the allegations of the first and second paragraphs of plaintiff's sixth cause of action.

II.

Defendant denies each and all the allegations of the third paragraph of plaintiff's sixth cause of action except that defendant admits that milk sold and delivered by Jack Cope to the defendant was co-mingled with milk sold and delivered to the defendant by other dairymen and that such other dairymen were stockholders and members of the defendant corporation.

III.

Defendant denies each and all of the allegations of the fourth paragraph of plaintiff's sixth cause of action save and except that defendant admits that during the period beginning December 1, 1944, and ending November 30, 1945, Jack Cope sold and delivered to defendant 67,321 pounds of Grade A milk, that the defendant co-mingled the milk delivered by Jack Cope with other milk delivered by others.

IV.

That defendant has no knowledge or information sufficient to form a belief concerning the fifth paragraph of plaintiff's sixth cause of action and therefore denies the allegations thereof.

As a further answer to plaintiff's sixth cause of action and by way of affirmative defense thereto defendant alleges as follows:

I.

That the milk sold and delivered by Jack Cope to the defendant between December 1, 1944, and November 30, 1945, was purchased by the defendant at a fixed price per hundred pounds of milk delivered, which price varied from time to time during the year and that Jack Cope has been paid in full by the defendant for all milk so purchased.

II.

That after making the deductions authorized by paragraphs 7, 8 and 12 of the marketing agreement Jack Cope has been fully paid by the defendant

for all milk sold and delivered to the defendant by Jack Cope.

In answer to plaintiff's Seventh Cause of Action the defendant admits, denies and alleges as follows:

I.

Defendant admits the allegations of the first and second paragraphs of plaintiff's seventh cause of action.

II.

Defendant denies each and all of the allegations of the third paragraph of plaintiff's seventh cause of action except that defendant admits that milk sold and delivered by William Ising to the defendant was co-mingled with milk sold and delivered to the defendant by other dairymen and that such other dairymen were stockholders and members of the defendant corporation.

III.

Defendant denies each and all of the allegations of the fourth paragraph of plaintiff's seventh cause of action save and except that defendant admits that during the period beginning December 1, 1944, and ending November 30, 1945, William Ising sold and delivered to defendant 85,157 pounds of Grade A milk, that the defendant co-mingled the milk delivered by William Ising with other milk delivered by others.

IV.

That defendant has no knowledge or information

sufficient to form a belief concerning the fifth paragraph of plaintiff's seventh cause of action and therefore denies the allegations thereof.

As a further answer to plaintiff's seventh cause of action and by way of affirmative defense thereto defendant alleges as follows:

I.

That the milk sold and delivered by William Ising to the defendant between December 1, 1944, and November 30, 1945, was purchased by the defendant at a fixed price per hundred pounds of milk delivered, which price varied from time to time during the year and that William Ising has been paid in full by the defendant for all milk so purchased.

II.

That after making the deductions authorized by paragraphs 7, 8 and 12 of the marketing agreement William Ising has been fully paid by the defendant for all milk sold and delivered to the defendant by William Ising.

In answer to plaintiff's Eighth Cause of Action the defendant admits, denies and alleges as follows:

I.

Defendant admits the allegations of the first and second paragraphs of plaintiff's eighth cause of action.

II.

Defendant denies each and all the allegations of the third paragraph of plaintiff's eighth cause of action except that defendant admits that milk sold and delivered by Joseph Lentz to the defendant was co-mingled with milk sold and delivered to the defendant by other dairymen and that such other dairymen were stockholders and members of the defendant corporation.

III.

Defendant denies each and all of the allegations of the fourth paragraph of plaintiff's eighth cause of action save and except that defendant admits that during the period beginning December 1, 1944, and ending November 30, 1945, Joseph Lentz sold and delivered to defendant 42,856 pounds of Grade A milk, that the defendant co-mingled the milk delivered by Joseph Lentz with other milk delivered by others.

IV.

That defendant has no knowledge or information sufficient to form a belief concerning the fifth paragraph of plaintiff's eighth cause of action and therefore denies the allegations thereof.

As a further answer to plaintiff's eighth cause of action and by way of affirmative defense thereto defendant alleges as follows:

I.

That the milk sold and delivered by Joseph Lentz to the defendant between December 1, 1944, and

November 30, 1945, was purchased by the defendant at a fixed price per hundred pounds of milk delivered, which price varied from time to time during the year and that Joseph Lentz has been paid in full by the defendant for all milk so purchased.

II.

That after making the deductions authorized by paragraphs 7, 8 and 12 of the marketing agreement Joseph Lentz has been fully paid by the defendant for all milk sold and delivered to the defendant by Joseph Lentz.

In answer to plaintiff's Ninth Cause of Action the defendant admits, denies and alleges as follows:

I.

Defendant admits the allegations of the first and second paragraphs of plaintiff's ninth cause of action.

II.

Defendant denies each and all the allegations of the third paragraph of plaintiff's ninth cause of action except that defendant admits that milk sold and delivered by Clarence Quarnstrom to the defendant was co-mingled with milk sold and delivered to the defendant by other dairymen and that such other dairymen were stockholders and members of the defendant corporation.

III.

Defendant denies each and all of the allegations of the fourth paragraph of plaintiff's ninth cause

of action save and except that defendant admits that during the period beginning December 1, 1944, and ending November 30, 1945, Clarence Quarnstrom sold and delivered to defendant 33,595 pounds of Grade A milk, that the defendant co-mingled the milk delivered by Clarence Quarnstrom with other milk delivered by others.

IV.

That defendant has no knowledge or information sufficient to form a belief concerning the fifth paragraph of plaintiff's ninth cause of action and therefore denies the allegations thereof.

As a further answer to plaintiff's ninth cause of action and by way of affirmative defense thereto defendant alleges as follows:

I.

That the milk sold and delivered by Clarence Quarnstrom to the defendant between December 1, 1944, and November 30, 1945, was purchased by the defendant at a fixed price per hundred pounds of milk delivered, which price varied from time to time during the year and that Clarence Quarnstrom has been paid in full by the defendant for all milk so purchased.

II.

That after making the deductions authorized by paragraphs 7, 8 and 12 of the marketing agreement Clarence Quarnstrom has been fully paid by the defendant for all milk sold and delivered to the defendant by Clarence Quarnstrom.

In answer to plaintiff's Tenth Cause of Action the defendant admits, denies and alleges as follows:

I.

Defendant admits the allegations of the first and second paragraphs of plaintiff's tenth cause of action.

II.

Defendant denies each and all the allegations of the third paragraph of plaintiff's tenth cause of action except that defendant admits that milk sold and delivered by Thomas Moffit to the defendant was co-mingled with milk sold and delivered to the defendant by other dairymen and that such other dairymen were stockholders and members of the defendant corporation.

III.

Defendant denies each and all of the allegations of the fourth paragraph of plaintiff's tenth cause of action save and except that defendant admits that during the period beginning December 1, 1944, and ending November 30, 1945, Thomas Moffit sold and delivered to defendant 81,451 pounds of Grade A milk, that the defendant co-mingled the milk delivered by Thomas Moffit with other milk delivered by others.

IV.

That defendant has no knowledge or information sufficient to form a belief concerning the fifth paragraph of plaintiff's tenth cause of action and therefore denies the allegations thereof.

As a further answer to plaintiff's tenth cause of action and by way of affirmative defense thereto defendant alleges as follows:

I.

That the milk sold and delivered by Thomas Moffit to the defendant between December 1, 1944, and November 30, 1945, was purchased by the defendant at a fixed price per hundred pounds of milk delivered, which price varied from time to time during the year and that Thomas Moffit has been paid in full by the defendant for all milk so purchased.

II.

That after making the deductions authorized by paragraphs 7, 8 and 12 of the marketing agreement Thomas Moffit has been fully paid by the defendant for all milk sold and delivered to the defendant by Thomas Moffit.

In answer to plaintiff's Eleventh Cause of Action the defendant admits, denies and alleges as follows:

I.

Defendant admits the allegations of the first and second paragraphs of plaintiff's eleventh cause of action.

II.

Defendant denies each and all the allegations of the third paragraph of plaintiff's eleventh cause of action except that defendant admits that milk sold and delivered by Paul Nelson to the defendant was co-mingled with milk sold and delivered to the

defendant by other dairymen and that such other dairymen were stockholders and members of the defendant corporation.

III.

Defendant denies each and all of the allegations of the fourth paragraph of plaintiff's eleventh cause of action save and except that defendant admits that during the period beginning December 1, 1944, and ending November 30, 1945, Paul Nelson sold and delivered to defendant 36,170 pounds of Grade A milk, that the defendant co-mingled the milk delivered by Paul Nelson with other milk delivered by others. [Penciled in Margin]: Ungraded.

IV.

That defendant has no knowledge or information sufficient to form a belief concerning the fifth paragraph of plaintiff's eleventh cause of action and therefore denies the allegations thereof.

As a further answer to plaintiff's Eleventh cause of action and by way of affirmative defense thereto defendant alleges as follows:

I.

That the milk sold and delivered by Paul Nelson to the defendant between December 1, 1944, and November 30, 1945, was purchased by the defendant at a fixed price per hundred pounds of milk delivered, which price varied from time to time during the year and that Paul Nelson has been paid in full by the defendant for all milk so purchased.

II.

That after making the deductions authorized by paragraphs 7, 8 and 12 of the marketing agreement Paul Nelson has been fully paid by the defendant for all milk sold and delivered to the defendant by Paul Nelson.

In answer to plaintiff's Twelfth Cause of action the defendant admits, denies and alleges as follows:

I.

Defendant admits the allegations of the first and second paragraphs of plaintiff's twelfth cause of action.

II.

Defendant denies each and all the allegations of the third paragraph of plaintiff's *twelfth except* that defendant admits that milk sold and delivered by B. J. Lossing to the defendant was co-mingled with milk sold and delivered to the defendant by other dairymen and that such other dairymen were stockholders and members of the defendant corporation.

III.

Defendant denies each and all of the allegations of the fourth paragraph of plaintiff's twelfth cause of action save and except that defendant admits that during the period beginning December 1, 1944, and ending November 30, 1945, B. J. Lossing sold and delivered to defendant 52,053 pounds of Grade A milk, that the defendant co-mingled the milk delivered by B. J. Lossing with other milk delivered by others.

IV.

That defendant has no knowledge or information sufficient to form a belief concerning the fifth paragraph of plaintiff's twelfth cause of action and therefore denies the allegations thereof.

As a further answer to plaintiff's Twelfth cause of action and by way of affirmative defense thereto defendant alleges as follows:

I.

That the milk sold and delivered by B. J. Lossing to the defendant between December 1, 1944, and November 30, 1945, was purchased by the defendant at a fixed price per hundred pounds of milk delivered, which price varied from time to time during the year and that B. J. Lossing has been paid in full by the defendant for all milk so purchased.

II.

That after making the deductions authorized by paragraphs 7, 8 and 12 of the marketing agreement B. J. Lossing has been fully paid by the defendant for all milk sold and delivered to the defendant by B. J. Lossing.

In answer to plaintiff's Thirteenth Cause of Action the defendant admits, denies and alleges as follows:

I.

Defendant admits the allegations of the first and second paragraphs of plaintiff's thirteenth cause of action.

II.

Defendant denies each and all the allegations of the third paragraph of plaintiff's thirteenth cause of action except that defendant admits that milk sold and delivered by Chet Liebing to the defendant was co-mingled with milk sold and delivered to the defendant by other dairymen and that such other dairymen were stockholders and members of the defendant corporation.

III.

Defendant denies each and all of the allegations of the fourth paragraph of plaintiff's thirteenth cause of action save and except that defendant admits that during the period beginning December 1, 1944, and ending November 30, 1945, Chet Liebing sold and delivered to defendant 1,475 pounds of Grade A milk, that the defendant co-mingled the milk delivered by Chet Liebing with other milk delivered by others. [Penciled in Margin]: Ungraded.

IV.

That defendant has no knowledge or information sufficient to form a belief concerning the fifth paragraph of plaintiff's thirteenth cause of action and therefore denies the allegations thereof.

As a further answer to plaintiff's Thirteenth cause of action and by way of affirmative defense thereto defendant alleges as follows:

I.

That the milk sold and delivered by Chet Liebing to the defendant between December 1, 1944, and

November 30, 1945, was purchased by the defendant at a fixed price per hundred pounds of milk delivered, which price varied from time to time during the year and that Chet Liebing has been paid in full by the defendant for all milk so purchased.

II.

That after making the deductions authorized by paragraphs 7, 8 and 12 of the marketing agreement Chet Liebing has been fully paid by the defendant for all milk sold and delivered to the defendant by Chet Liebing.

In answer to plaintiff's Fourteenth Cause of Action the defendant admits, denies and alleges as follows:

I.

Defendant admits the allegations of the first and second paragraphs of plaintiff's fourteenth cause of action.

II.

Defendant denies each and all the allegations of the third paragraph of plaintiff's fourteenth cause of action except that defendant admits that milk sold and delivered by Alvin J. Collier to the defendant was co-mingled with milk sold and delivered to the defendant by other dairymen and that such other dairymen were stockholders and members of the defendant corporation.

III.

Defendant denies each and all of the allegations of the fourth paragraph of plaintiff's fourteenth

cause of action save and except that defendant admits that during the period beginning December 1, 1944, and ending November 30, 1945, Alvin J. Collier sold and delivered to defendant 9,851 pounds of Grade A milk, that defendant co-mingled the milk delivered by Alvin J. Collier with other milk delivered by others. [Penciled in Margin]: Ungraded.

IV.

That defendant has no knowledge or information sufficient to form a belief concerning the fifth paragraph of plaintiff's fourteenth cause of action and therefore denies the allegations thereof.

As a further answer to plaintiff's Fourteenth cause of action and by way of affirmative defense thereto defendant alleges as follows:

I.

That the milk sold and delivered by Alvin J. Collier to the defendant between December 1, 1944, and November 30, 1945, was purchased by the defendant at a fixed price per hundred pounds of milk delivered, which price varied from time to time during the year and that Alvin J. Collier has been paid in full by the defendant for all milk so purchased.

II.

That after making the deductions authorized by paragraphs 7, 8 and 12 of the marketing agreement Alvin J. Collier has been fully paid by the defendant for all milk sold and delivered to the defendant by Alvin J. Collier.

In answer to plaintiff's Fifteenth Cause of Action the defendant admits, denies and alleges as follows:

I.

Defendant admits the allegations of the first and second paragraphs of plaintiff's fifteenth cause of action.

II.

Defendant denies each and all the allegations of the third paragraph of plaintiff's fifteenth cause of action except that defendant admits that milk sold and delivered by William Lentz to the defendant was co-mingled with milk sold and delivered to the defendant by other dairymen and that such other dairymen were stockholders and members of the defendant corporation.

III.

Defendant denies each and all of the allegations of the fourth paragraph of plaintiff's fifteenth cause of action save and except that defendant admits that during the period beginning December 1, 1944, and ending November 30, 1945, William Lentz sold and delivered to defendant 58,303 pounds of Grade A milk, that defendant co-mingled the milk delivered by William Lentz with other milk delivered by others.

IV.

That defendant has no knowledge or information sufficient to form a belief concerning the fifth paragraph of plaintiff's fifteenth cause of action and therefore denies the allegations thereof.

As a further answer to plaintiff's Fifteenth cause of action and by way of affirmative defense thereto defendant alleges as follows:

I.

That the milk sold and delivered by William Lentz to the defendant between December 1, 1944, and November 30, 1945, was purchased by the defendant at a fixed price per hundred pounds of milk delivered, which price varied from time to time during the year and that William Lentz has been paid in full by the defendant for all milk so purchased.

II.

That after making deductions authorized by paragraphs 7, 8 and 12 of the marketing agreement William Lentz has been fully paid by the defendant for all milk sold and delivered to the defendant by William Lentz.

In answer to plaintiff's Sixteenth Cause of Action the defendant admits, denies and alleges as follows:

I.

Defendant admits the allegations of the first and second paragraphs of plaintiff's Sixteenth cause of action.

II.

Defendant denies each and all the allegations of the third paragraph of plaintiff's sixteenth cause of action except that defendant admits that milk sold and delivered by Henning Benson to the de-

fendant was co-mingled with milk sold and delivered to the defendant by other dairymen and that such other dairymen were stockholders and members of the defendant corporation.

III.

Defendant denies each and all of the allegations of the fourth paragraph of plaintiff's sixteenth cause of action save and except that defendant admits that during the period beginning December 1, 1944, and ending November 30, 1945, Henning Benson sold and delivered to defendant 32,299 pounds of Grade A milk, that defendant co-mingled the milk delivered by Henning Benson with other milk delivered by others. [Penciled in Margin]: Ungraded.

IV.

That defendant has no knowledge or information sufficient to form a belief concerning the fifth paragraph of plaintiff's sixteenth cause of action and therefore denies the allegations thereof.

As a further answer to plaintiff's Sixteenth cause of action and by way of affirmative defense thereto defendant alleges as follows:

I.

That the milk sold and delivered by Henning Benson to the defendant between December 1, 1944, and November 30, 1945, was purchased by the defendant at a fixed price per hundred pounds of milk delivered, which price varied from time to time during the year and that Henning Benson

has been paid in full by the defendant for all milk so purchased.

II.

That after making the deductions authorized by paragraphs 7, 8 and 12 of the marketing agreement Henning Benson has been fully paid by the defendant for all milk sold and delivered to the defendant by Henning Benson.

In answer to plaintiff's Seventeenth Cause of Action the defendant admits, denies and alleges as follows:

I.

Defendant admits the allegations of the first and second paragraphs of plaintiff's Seventeenth cause of action.

II.

Defendant denies each and all the allegations of the third paragraph of plaintiff's seventeenth cause of action except that defendant admits that milk sold and delivered by Walter C. Huntley to the defendant was co-mingled with milk sold and delivered to the defendant by other dairymen and that such other dairymen were stockholders and members of the defendant corporation.

III.

Defendant denies each and all of the allegations of the fourth paragraph of plaintiff's seventeenth cause of action save and except that defendant admits that during the period beginning December 1, 1944, and ending November 30, 1945, Walter C.

Huntley sold and delivered to defendant 32,236 pounds of Grade A milk, that defendant co-mingled the milk delivered by Walter C. Huntley with other milk delivered by others.

IV.

That defendant has no knowledge or information sufficient to form a belief concerning the fifth paragraph of plaintiff's seventeenth cause of action and therefore denies the allegations thereof.

As a further answer to plaintiff's Seventeenth cause of action and by way of affirmative defense thereto defendant alleges as follows:

I.

That the milk sold and delivered by Walter C. Huntley to the defendant between December 1, 1944, and November 30, 1945, was purchased by the defendant at a fixed price per hundred pounds of milk delivered, which price varied from time to time during the year and that Walter C. Huntley has been paid in full by the defendant for all milk so purchased.

II.

That after making the deductions authorized by paragraphs 7, 8 and 12 of the marketing agreement Walter C. Huntley has been fully paid by the defendant for all milk sold and delivered to the defendant by Walter C. Huntley.

In answer to plaintiff's Eighteenth Cause of Action the defendant admits, denies and alleges as follows:

I.

Defendant admits the allegations of the first and second paragraphs of plaintiff's eighteenth cause of action.

II.

Defendant denies each and all the allegations of the third paragraph of plaintiff's eighteenth cause of action except that defendant admits that milk sold and delivered by Lawrence Plumley to the defendant was co-mingled with milk sold and delivered to the defendant by other dairymen and that such other dairymen were stockholders and members of the defendant corporation.

III.

Defendant denies each and all of the allegations of the fourth paragraph of plaintiff's eighteenth cause of action save and except that defendant admits that during the period beginning December 1, 1944, and ending November 30, 1945, Lawrence Plumley sold and delivered to defendant 15,790 pounds of Grade A milk, that defendant co-mingled the milk delivered by Lawrence Plumley with other milk delivered by others. [Penciled in Margain]: Ungraded.

IV.

That defendant has no knowledge or information sufficient to form a belief concerning the fifth paragraph of plaintiff's eighteenth cause of action and therefore denies the allegations thereof.

As a further answer to plaintiff's eighteenth cause of action and by way of affirmative defense thereto defendant alleges as follows:

I.

That the milk sold and delivered by Lawrence Plumley to the defendant between December 1, 1944, and November 30, 1945, was purchased by the defendant at a fixed price per hundred pounds of milk delivered, which price varied from time to time during the year and that Lawrence Plumley has been paid in full by the defendant for all milk so purchased.

II.

That after making the deductions authorized by paragraphs 7, 8 and 12 of the marketing agreement Lawrence Plumley has been fully paid by the defendant for all milk sold and delivered to the defendant by Lawrence Plumley.

In answer to plaintiff's Nineteenth Cause of Action the defendant admits, denies and alleges as follows:

I.

Defendant admits the allegations of the first and second paragraphs of plaintiff's Nineteenth cause of action.

II.

Defendant denies each and all the allegations of the third paragraph of plaintiff's nineteenth cause of action except that defendant admits that milk sold and delivered by H. S. Bauer to the defendant

was co-mingled with milk sold and delivered to the defendant by other dairymen and that such other dairymen were stockholders and members of the defendant corporation.

III.

Defendant denies each and all of the allegations of the fourth paragraph of plaintiff's nineteenth cause of action save and except that defendant admits that during the period beginning December 1, 1944, and ending November 30, 1945, H. S. Bauer sold and delivered to defendant 6,196 pounds of Grade A milk, that defendant co-mingled the milk delivered by H. S. Bauer with other milk delivered by others. [Penciled in Margin]: Ungraded.

IV.

That defendant has no knowledge or information sufficient to form a belief concerning the fifth paragraph of plaintiff's nineteenth cause of action and therefore denies the allegations thereof.

As a further answer to plaintiff's nineteenth cause of action and by way of affirmative defense thereto defendant alleges as follows:

I.

That the milk sold and delivered by H. S. Bauer to the defendant between December 1, 1944, and November 30, 1945, was purchased by the defendant at a fixed price per hundred pounds of milk delivered, which price varied from time to time during the year and that H. S. Bauer has been paid in full by the defendant for all milk so purchased.

II.

That after making the deductions authorized by paragraphs 7, 8 and 12 of the marketing agreement H. S. Bauer has been fully paid by the defendant for all milk sold and delivered to the defendant by H. S. Bauer.

In answer to plaintiff's Twentieth Cause of Action the defendant admits, denies and alleges as follows:

I.

Defendant admits the allegations of the first and second paragraphs of plaintiff's Twentieth cause of action.

II.

Defendant denies each and all the allegations of the third paragraph of plaintiff's twentieth cause of action except that defendant admits that milk sold and delivered by A. R. Moffitt to the defendant was co-mingled with milk sold and delivered to the defendant by other dairymen and that such other dairymen were stockholders and members of the defendant corporation.

III.

Defendant denies each and all of the allegations of the fourth paragraph of plaintiff's twentieth cause of action save and except that defendant admits that during the period beginning December 1, 1944, and ending November 30, 1945, A. R. Moffitt sold and delivered to defendant 63,949 pounds of Grade A milk, that defendant co-mingled the milk

delivered by A. R. Moffitt with other milk delivered by others.

IV.

That defendant has no knowledge or information sufficient to form a belief concerning the fifth paragraph of plaintiff's twentieth cause of action and therefore denies the allegations thereof.

As a further answer to plaintiff's twentieth cause of action and by way of affirmative defense thereto defendant alleges as follows:

I.

That the milk sold and delivered by A. R. Moffitt to the defendant between December 1, 1944, and November 30, 1945, was purchased by the defendant at a fixed price per hundred pounds of milk delivered, which price varied from time to time during the year and that A. R. Moffitt has been paid in full by the defendant for all milk so purchased.

II.

That after making the deductions authorized by paragraphs 7, 8 and 12 of the marketing agreement A. R. Moffitt has been fully paid by the defendant for all milk sold and delivered to the defendant by A. R. Moffitt.

In answer to plaintiff's Twenty-first Cause of Action the defendant admits, denies and alleges as follows:

I.

Defendant admits the allegations of the first and

second paragraphs of plaintiff's twenty-first cause of action.

II.

Defendant denies each and all the allegations of the third paragraph of plaintiff's twenty-first cause of action except that defendant admits that milk sold and delivered by Leonard Bergan to the defendant was co-mingled with milk sold and delivered to the defendant by other dairymen and that such other dairymen were stockholders and members of the defendant corporation.

III.

Defendant denies each and all of the allegations of the fourth paragraph of plaintiff's twenty-first cause of action save and except that defendant admits that during the period beginning December 1, 1944, and ending November 30, 1945, Leonard Bergan sold and delivered to defendant 2,643 pounds of Grade A milk, that defendant co-mingled the milk delivered by Leonard Bergan with other milk delivered by others. [Penciled in Margin]: Ungraded.

IV.

That defendant has no knowledge or information sufficient to form a belief concerning the fifth paragraph of plaintiff's twenty-first cause of action and therefore denies the allegations thereof.

As a further answer to plaintiff's twenty-first cause of action and by way of affirmative defense thereto defendant alleges as follows:

I.

That the milk sold and delivered by Leonard Bergan to the defendant between December 1, 1944, and November 30, 1945, was purchased by the defendant at a fixed price per hundred pounds of milk delivered, which price varied from time to time during the year and that Leonard Bergan has been paid in full by the defendant for all milk so purchased.

II.

That after making the deductions authorized by paragraphs 7, 8 and 12 of the marketing agreement Leonard Bergan has been fully paid by the defendant for all milk sold and delivered to the defendant by Leonard Bergan.

In answer to plaintiff's Twenty-second cause of action the defendant admits, denies and alleges as follows:

I.

Defendant admits the allegations of the first and second paragraphs of plaintiff's twenty-second cause of action.

II.

Defendant denies each and all the allegations of the third paragraph of plaintiff's twenty-second cause of action except that defendant admits that milk sold and delivered by Harold Thuma to the defendant was co-mingled with milk sold and delivered to the defendant by other dairymen and that such other dairymen were stockholders and members of the defendant corporation.

III.

Defendant denies each and all of the allegations of the fourth paragraph of plaintiff's twenty-second cause of action save and except that defendant admits that during the period beginning December 1, 1944, and ending November 30, 1945, Harold Thuma sold and delivered to defendant 23,004 pounds of Grade A milk, that defendant co-mingled the milk delivered by Harold Thuma with other milk delivered by others. [Penciled in Margin]: Ungraded.

IV.

That defendant has no knowledge or information sufficient to form a belief concerning the fifth paragraph of plaintiff's twenty-second cause of action and therefore denies the allegations thereof.

As a further answer to plaintiff's twenty-second cause of action and by way of affirmative defense thereto defendant alleges as follows:

I.

That the milk sold and delivered by Harold Thuma to the defendant between December 1, 1944, and November 30, 1945, was purchased by the defendant at a fixed price per hundred pounds of milk delivered, which price varied from time to time during the year and that Harold Thuma has been paid in full by the defendant for all milk so purchased.

II.

That after making the deductions authorized by paragraphs 7, 8 and 12 of the marketing agreement Harold Thuma has been fully paid by the defendant

for all milk sold and delivered to the defendant by Harold Thuma.

Wherefore, defendant having fully answered the allegations of plaintiff's Complaint prays that plaintiff take nothing thereby and that this matter may be dismissed with costs to the defendant.

DAVIS & RENFREW,
Attorneys for the Defendant.

By /s/ EDWARD V. DAVIS.

United States of America,
Territory of Alaska—ss.

E. E. Harriss, being first duly sworn, upon his oath, deposes and says:

That he is the Manager of the Matanuska Valley Farmers Cooperating Association, the defendant in the above-entitled action, and that he makes this verification for and on behalf of said corporation; that he has read the within and foregoing Answer, knows the contents thereof and that the same is true as he verily believes.

/s/ E. E. HARRISS.

Subscribed and sworn to before me this 27th day of December, 1946.

[Seal] /s/ KATHLY R. HAMBY,
Notary Public in and for the
Territory of Alaska.

My commission expires December 15th, 1947.

[Endorsed]: Filed January 29, 1947.

MINUTE ORDER ENTERED MARCH 13, 1947

Trial by Court

[Title of Cause.]

No. A-4252

Now on this 13th day of March, 1947, came the plaintiff, C. R. Monaghan, in cause No. A-4252, entitled C. R. Monaghan, plaintiff versus Matanuska Valley Farmers Cooperating Association, a corporation, defendant, and with his counsel George B. Grigsby, the defendant being present through Edward V. Davis, of its counsel, and both sides announcing themselves as ready for trial the following proceedings were had, to wit:

Opening statement to the Court was had by George B. Grigsby, for and in behalf of the plaintiff.

Statement to the Court was had by Edward V. Davis, for and in behalf of the defendant.

At 12:05 o'clock p. m. Court continued cause until 2:00 o'clock p. m.

Now came the respective parties and the respective counsel as heretofore and the trial of cause No. A-4252, entitled C. R. Monaghan, plaintiff versus Matanuska Valley Farmers Cooperating Association, a corporation, defendant, was resumed.

Edward V. Davis, resumed his opening statement to the Court, for and in behalf of the defendant.

Fred McAllister, being first duly sworn testified for and in behalf of the plaintiff.

A form of Member's Standard Marketing Contract, was duly offered, marked and admitted as plaintiff's exhibit No. 1.

A Report of milk sold, was duly offered, marked and admitted as plaintiff's exhibit No. 2.

An Account of Fiscal year 1946 and 1945 etc., was duly offered, marked and admitted as plaintiff's exhibit No. 3 as to year 1945 only.

A condensed profit and loss statement of 1944 was duly offered, marked and admitted as plaintiff's exhibit No. 4.

C. R. Monaghan, being first duly sworn, testified for and in behalf of plaintiff.

Four vouchers were duly offered, marked and admitted as plaintiff's exhibit No. 5.

At 4:30 o'clock p.m. Court continued cause until 10:00 o'clock a.m., of Friday, March 14, 1947.

MINUTE ORDER ENTERED MARCH 14, 1947

Trial by Court Continued

[Title of Cause.]

No. A-4252

Now came the respective parties and the respective counsel as heretofore and the trial of cause No. A-4252, entitled C. R. Monaghan, plaintiff versus Matanuska Valley Farmers Cooperating Association, a corporation, defendant, was resumed.

C. R. Monaghan, heretofore duly sworn, resumed the witness stand and testified for and in behalf of the plaintiff.

Marvin Allyn, being first duly sworn, testified for and in behalf of the plaintiff.

At 12:05 o'clock p. m., Court continued cause until 1:30 o'clock p. m.

Now came the respective parties and the respective counsel as heretofore and the trial of cause No. A-4252, entitled C. R. Monaghan, plaintiff versus Matanuska Valley Farmers Cooperating Association, a corporation, defendant, was resumed.

Marvin Allyn, heretofore duly sworn, resumed the witness stand for further testimony for and in behalf of the plaintiff.

A report of audit for the Matanuska Valley Farmers Cooperating Association for the year 1945 was duly offered, marked and admitted as plaintiff's exhibit No. 6.

A report of audit for the Matanuska Valley Farmers Cooperating Association for the year 1944 was duly offered, marked and admitted as defendant's exhibit No. 1.

The articles of incorporation and the code of bylaws for the Matanuska Valley Farmers Cooperating Association were duly offered, marked and admitted as defendant's exhibit No. 2.

A statement of milk sold by the plaintiff was duly offered, marked and admitted as defendant's exhibit No. 3.

A schedule of milk prices paid to farmer was duly offered, marked and admitted as defendant's exhibit No. 4.

At 3:06 o'clock p.m., Court continued the trial of this cause to 3:18 o'clock p. m.

Now came the respective parties and the respective counsel as heretofore and the trial of cause No.

A-4252, entitled C. R. Monaghan, plaintiff versus Matanuska Valley Farmers Cooperating Association, a corporation, defendant, was resumed.

Marvin Allyn, heretofore duly sworn, resumed the witness stand for further testimony for and in behalf of the plaintiff.

Roland Snodgrass, being first duly sworn, testified for and in behalf of the plaintiff.

At 4:25 o'clock p. m., Court continued the trial of this cause to 11:00 o'clock a. m., of Tuesday, April 1, 1947.

MINUTE ORDER ENTERED APRIL 7, 1947

Trial by Court Continued

[Title of Cause.]

No. A-4252

Now came the respective parties and the respective counsel as heretofore and the trial of cause No. A-4252, entitled C. R. Monaghan, plaintiff versus Matanuska Valley Farmers Cooperating Association, a corporation, defendant, was resumed. Roland Snodgrass, heretofore duly sworn, resumed the witness stand for further testimony for and in behalf of the plaintiff.

At 11:06 o'clock a. m. Court continued trial of this cause to 11:15 o'clock a. m.

Now came the respective parties and the respective counsel as heretofore and the trial of cause No. A-4252, entitled C. R. Monaghan, plaintiff versus

Matanuska Valley Farmers Cooperating Association, a corporation, defendant, was resumed.

Roland Snodgrass, heretofore duly sworn, resumed the witness stand for further testimony for and in behalf of the plaintiff.

A. A. Rempel, being first duly sworn, testified for and in behalf of the plaintiff.

A remittance advice titled second payment on milk pool, was duly offered, marked and admitted as plaintiff's exhibit No. 7.

At 11:50 o'clock a.m. Court continued trial of this cause to 2:00 o'clock p. m.

Now came the respective parties and the respective counsel as heretofore and the trial of cause No. A-4252, entitled C. R. Monaghan, plaintiff versus Matanuska Valley Farmers Cooperating Association, a corporation, defendant, was resumed.

Clarence Quarnstrom, being first duly sworn, testified for and in behalf of the plaintiff.

A remittance advice titled "second milk pool advance" was duly offered, marked and admitted as plaintiff's exhibit No. 8.

A final payment on milk pool dated September 10, 1945 was duly offered, marked and admitted as plaintiff's exhibit No. 9.

At 3:12 o'clock p. m., Court declared recess until 3:23 o'clock p.m.

Now came the respective parties and the respective counsel as heretofore and the trial of cause No. A-4252, entitled C. R. Monaghan, plaintiff versus Matanuska Valley Farmers Cooperating Association, a corporation, defendant, was resumed.

William Ising, being first duly sworn, testified for and in behalf of the plaintiff.

Arvid Johnson, being first duly sworn, testified for and in behalf of the plaintiff.

Two remittance advices were duly offered, marked and admitted as plaintiff's exhibit No. 10.

One remittance advice and a final payment on milk pool slip, the latter dated September 10, 1945, was duly offered, marked and admitted as plaintiff's exhibit No. 11.

A remittance advice and a final payment on milk pool slip, the latter dated September 10, 1945 was duly offered, marked and admitted as plaintiff's exhibit No. 12.

Two remittance advices were duly offered, marked and admitted as plaintiff's exhibit No. 13.

A remittance advice was duly offered, marked and admitted as plaintiff's exhibit No. 14.

John Lyle Cope, being first duly sworn, testified for and in behalf of the plaintiff.

A remittance advice was duly offered, marked and admitted as plaintiff's exhibit No. 15.

Two remittance advices were duly offered, marked and admitted as plaintiff's exhibit No. 16.

At this time oral stipulation was made by and between respective counsel regarding future testimony in behalf of the plaintiff.

At 4:03 o'clock p. m. Court continued the trial of this cause until 10:00 o'clock a. m. of Tuesday, April 8, 1947.

MINUTE ORDER ENTERED APRIL 8, 1947

Trial by Court Continued

[Title of Cause.]

No. A-4252

Now came the respective parties and the respective counsel as heretofore and the trial of cause No. A-4252, entitled C. R. Monaghan, plaintiff versus Matanuska Valley Farmers Cooperating Association, a corporation, defendant, was resumed.

Roland Snodgrass, heretofore duly sworn, resumed the witness stand for further testimony for and in behalf of plaintiff.

At 11:05 o'clock a. m. Court continued trial of this cause to 11:15 o'clock a.m.

Now came the respective parties and the respective counsel as heretofore and the trial of cause No. A-4252, entitled C. R. Monaghan, plaintiff versus Matanuska Valley Farmers Cooperating Association, a corporation, defendant, was resumed.

Roland Snodgrass, heretofore duly sworn, resumed the witness stand for further testimony for and in behalf of the plaintiff.

At 12 noon Court continued trial of this cause to 1:30 o'clock p. m.

Now came the respective parties and the respective counsel as heretofore and the trial of cause No. A-4252, entitled C. R. Monaghan, plaintiff versus Matanuska Valley Farmers Cooperating Association, a corporation, defendant, was resumed.

Roland Snodgrass, heretofore duly sworn, re-

sumed the witness stand for further testimony for and in behalf of the plaintiff.

At 2:40 o'clock p. m. Court continued trial of this cause to 2:50 o'clock p. m.

Now came the respective parties and the respective counsel as heretofore and the trial of cause No. A-4252, entitled C. R. Monaghan, plaintiff versus Matanuska Valley Farmers Cooperating Association, a corporation, defendant, was resumed.

Roland Snodgrass, heretofore duly sworn, resumed the witness stand for further testimony for and in behalf of the plaintiff.

Walter E. Huntley, being first duly sworn, testified for and in behalf of the plaintiff.

Two remittance advices were duly offered, marked and admitted as plaintiff's exhibit No. 17.

Marvin Allyn, heretofore duly sworn, resumed the witness stand for further testimony for and in behalf of the plaintiff.

A profit and loss calculation as copied from the Courtroom blackboard as illustration of the testimony of Roland Snodgrass was duly offered, marked and admitted as defendant's exhibit No. 5.

Fred McAllister, heretofore duly sworn, resumed the witness stand for further testimony for and in behalf of the plaintiff.

The plaintiff rests.

Virgil Eckert, being first duly sworn, testified for and in behalf of the defendant.

A copy of the minutes of a meeting of the board of directors for the Matanuska Valley Farmers Co-operating Association, on February 10, 1943, was duly offered, marked and admitted as defendant's exhibit No. 6.

A copy of the minutes of a meeting of the board of directors for the Matanuska Valley Farmers Co-operating Association, of February 13, 1943, was duly offered, marked and admitted as defendant's exhibit No. 7.

A copy of the minutes of a meeting of the board of directors for the Matanuska Valley Farmers Co-operating Association, of January 15, 1944, was duly offered, marked and admitted as defendant's exhibit No. 8.

A copy of a motion made by Hoffman at board of directors meeting on October 7, 1944, was duly offered, marked and admitted as defendant's exhibit No. 9.

A copy of the minutes of board of directors meeting on March 22, 1946, was duly offered, marked and admitted as defendant's exhibit No. 10.

At this time, on oral motion of Edward V. Davis, of counsel for defendants, the trial of this cause was continued to 11:00 o'clock a.m. of Friday, April 18, 1947.

MINUTE ORDER ENTERED MAY 16, 1947

M. O. of Continuance

[Title of Cause.]

No. A-4252

Now at this time the trial of cause No. A-4252, entitled C. R. Monaghan plaintiff versus Matanuska Valley Farmers Cooperating Association, a corporation, defendant, was continued for completion of trial until July 15, 1947 at 10:00 o'clock a.m.

———

MINUTE ORDER ENTERED JULY 15, 1947

Trial by Court Continued

[Title of Cause.]

No. A-4252

Now came the respective parties and the respective counsel as heretofore and the trial of cause No. A-4252, entitled C. R. Monaghan, plaintiff versus Matanuska Valley Farmers Cooperating Association, a corporation, defendant, was resumed.

Marvin Allyn, heretofore duly sworn, resumed the witness stand for further testimony for and in behalf of the defendant.

L. C. Stock, being first duly sworn, testified for and in behalf of the defendant.

At 11:18 o'clock a.m. Court continued trail of this cause to 11:25 o'clock a.m.

Now came the respective parties and the respective counsel as heretofore and the trail of cause No.

A-4252, entitled C. R. Monaghan, plaintiff versus Matanuska Valley Farmers Cooperating Association, a corporation, defendant, was resumed.

Marvin Allyn, heretofore duly sworn, resumed the witness stand for further cross-examination for and in behalf of the plaintiff.

The defendant rests.

Fred McAllister, heretofore duly sworn, resumed the witness stand for rebuttal examination for and in behalf of the plaintiff.

An assignment to C. R. Monaghan by Harold L. Thuma was duly offered, marked and admitted as plaintiff's exhibit No. 18.

Virgil Eckert, heretofore duly sworn, resumed the witness stand for further testimony for and in behalf of the defendants.

Plaintiff rests.

Defense rests.

On motion of George B. Grigsby, counsel for plaintiff, counsel stipulated to submit written arguments and Court directed fifteen days for plaintiff to submit written brief and defendant given fifteen days to submit written brief. At this time ten days was allowed plaintiff to answer defendants argument in brief.

At 11:47 o'clock a.m. Court continued trial of this cause to termination of period allowed for submission of briefs.

[Title of District Court and Cause.]

MOTION TO AMEND COMPLAINT TO CONFORM TO THE FACTS

Comes now the plaintiff in the above-entitled action and moves the court that an order issue directing that the complaint herein may be amended to conform to the facts, as shown by the evidence introduced in said action.

Plaintiff further moves that this cause be reopened for the purpose of this motion.

/s/ GEORGE B. GRIGSBY,
Attorney for Plaintiff.

Service admitted August 14, 1947.

/s/ EDWARD V. DAVIS,
Attorneys for Defendant.

[Endorsed]: Filed August 14, 1947.

MINUTE ORDER ENTERED NOVEMBER 21, 1947

M. O. Rendering Oral Decision

[Title of Cause.]

No. A-4252

Now at this time the plaintiff not being present but represented by his counsel, George B. Grigsby, the defendant not being present but represented by Edward V. Davis of its counsel,

The Court now renders oral decision in cause No. A-4252, entitled, C. R. Monaghan, plaintiff, versus Matanuska Valley Farmers Cooperating Association, defendant, finding for the plaintiff and against the defendant, and directs counsel to prepare and submit Findings of Fact and Conclusions of Law and Judgment in accordance with the oral decision given herein.

———

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on for hearing on the 13th day of March, 1947, before the above-entitled court sitting at Anchorage, Alaska, the plaintiff appearing in person and by his attorney, George B. Grigsby, the defendant appearing by their attorneys, Renfrew and Davis.

It having been stipulated by the respective parties that the case be tried by the court without a jury, witnesses were sworn and testified on behalf of the plaintiff and the defendant; and the court having heard the testimony and being fully advised in the premises now makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

I.

That the Matanuska Valley Farmers Cooperating Association is a corporation, organized and doing

business by virtue of the laws of the Territory of Alaska, and during the period begining December 1st, 1944, and for a long time prior thereto and ever since said date, was engaged in the business of buying, selling, handling and processing agricultural products on a cooperative basis with its stockholders and members, near Palmer, Alaska.

II.

That the plaintiff, and his assignors named in the Complaint herein, were, during the period abovementioned, stockholders and members of the said Matanuska Valley Farmers Cooperating Association, and engaged in the dairy business near Palmer, Alaska, and during the period beginning December 1st, 1944, and ending November 30, 1945, and for a long time prior thereto, sold their milk product to the said defendant under and according to the terms of written contracts theretofore entered into between the plaintiff and his said assignors, and defendant. That said written contracts were identical in terms and a true copy of said contract except that the signatures of the plaintiff and of plaintiff's assignors and of the defendant are omitted therefrom, is attached to the Complaint on file herein and marked "Exhibit A" and made a part of said Complaint.

III.

That paragraphs (3), (4), (5), (6), and (7) of said contract are as follows:

(3) It is mutually agreed that the term "agricultural products" as used herein includes horticul-

tural, viticultural, forestry, dairy, poultry, bee and farm and ranch products and also includes such livestock raised for the market as the Association accepts for resale.

(4) The Association agrees that upon delivery of agricultural products hereunder it may make or cause to be made through its Management and Sales Agency such requested advances to the Producer on said products as in its discretion may be justified by the Producer's immediate needs and by marketing conditions.

(5) The Association agrees to receive, handle by inspecting, assembling, sorting, grading, packing, preserving, canning or otherwise processing, storing, advertising, transporting and other services necessary to prepare for market and sale and to market and resell agricultural products delivered hereunder, together with like products delivered by other members either separately or comingled or pooled at its discretion and to pay therefor as set forth in this Contract or cause the same to be done through its Management and Sales Agency.

(6) Producer agrees that the Association may establish or cause to be established through its Management and Sales Agency daily, weekly, monthly, seasonal, yearly, and/or other pools by grades of any agricultural products received from its members and may co-mingle or pool any of the products delivered hereunder with other like products delivered by others or cause same to be done and remit

or cause to be remitted to the Producer and other producers concerned, on the basis of the interest of each one therein, as payments in full for the products delivered by them and sold in said pool, the net average price received therefor after making the deductions provided for in this Contract with the object of causing all members whose products are sold therein to receive the same price for products of the same grade.

(7) The Association agrees to pay or cause to be paid through its Management and Sales Agency to the Producer the amounts received for the said resale of said products sold separately or the amounts representing Producer's interest in products resold wherein his products are pooled or co-mingled with others as provided for in Paragraph 6 herein after making deductions to cover the following items in connection therewith: (a) repayment of advances made to Producer under Paragraph 4 of this Contract and interest on said advances; (b) reasonable charges for the services of receiving, handling and selling said agricultural products under Paragraph 5 of this Contract; (c) operating and maintenance expenses; (d) one dollar each year in payment of the official publication of the Association in case said publication is issued; (e) two per centum (2%) of the gross sales price received for the products of said member sold separately or of the amounts representing said member's interest in products sold wherein his products are pooled or co-mingled with others as funds belonging to the Association to meet

its indebtedness and additional expenses, contribute to the Association's reserves (with which to acquire ownership of industries and enterprises and property in connection therewith and for other proper purposes), to pay interest on capital stock by way of dividends and for other proper purposes as provided for by the laws of Alaska pertaining to "Co-operative Associations" under which the Association has been incorporated and by the By-Laws of the Association.

IV.

That in accordance with the provisions of paragraphs (5) and (6) of said contract, as above set forth, the defendant elected to and did, during all the period beginning December 1st, 1944, and ending November 30th, 1945, pool and co-mingle the milk sold and delivered by plaintiff and his assignors with the milk sold and delivered to defendant by other dairymen, who were, during all the said period stockholders and members of the defendant corporation, and resold the said milk and milk products thereof as thus co-mingled.

V.

That during the period beginning December 1st, 1944, and ending November 30th, 1945, the plaintiff and his assignors sold and delivered to defendant 1,082,128 pounds of Grade A milk, and 176,986 pounds of Grade B milk for which defendant promised and agreed to pay plaintiff and his said assignors, according to the provisions of paragraphs (6) and (7) of the said contract, that is to say an amount

representing plaintiff's interest and the interest of plaintiff's assignors in all milk and milk product resold by defendant with which plaintiff's milk was pooled and co-mingled, and the proceeds thereof, after making deductions to cover the items mentioned and stated in paragraph (7) of the said contract.

That the defendant pooled and co-mingled the milk so as aforesaid sold and delivered to defendant by plaintiff and his assignors, with the milk sold and delivered to defendant by others and resold the same as thus co-mingled; that by reason of the premises there became due and owing to the plaintiff and his assignors from the defendant on the 1st day of July, 1946, after deduction of the items stated in paragraph (7) of said contract the aggregate sum of $28,700.60, no part of which has been paid.

VI.

That for a valuable consideration and prior to the commencement of this action, the plaintiff's said assignors, named in the Complaint herein, sold and assigned to plaintiff their respective interest in the aforesaid aggregate sum of $28,700.60 and plaintiff is now the owner thereof.

VII.

That prior to the commencement of this action the plaintiff and his said assignors demanded of defendant the payment of the sums respectively due each of them, but defendant has failed, neglected and refused to pay the same or any part thereof.

and the same are still due, owing and unpaid, together with interest according to law.

And from the foregoing facts the court deduces the following Conclusions of Law:

Conclusions of Law

I.

That the plaintiff is entitled to recover from the defendant the sum of $28,700.60 being the sum due and owing to plaintiff as set forth in paragraphs V and VI hereof, together with interest at the rate of 6 per cent per annum from the 1st day of July, 1946.

Let judgment be entered accordingly.

Dated at Anchorage, Alaska, this 29th day of December, 1947.

/s/ ANTHONY J. DIMOND,
District Judge.

To each of the above Findings of Fact the defendant objects, and an exception is allowed.

/s/ ANTHONY J. DIMOND,
District Judge.

Dated December 29th, 1947.

[Endorsed]: Filed December 29, 1947.

In The District Court for The Territory of Alaska,
Third Division

No. A-4252

C. R. MONAGHAN,

Plaintiff,

vs.

MATANUSKA VALLEY FARMERS COOPERATING ASSOCIATION, a Corporation,

Defendant.

JUDGMENT

This cause coming on for trial on the 13th day of March, 1947, before the above-entitled court sitting at Anchorage, Alaska, the plaintiff appearing in person and by his attorney, George B. Grigsby, the defendant appearing by their attorneys, Renfrew and Davis; it having been stipulated by the respective parties that the case be tried before the court without a jury, and witnesses having been sworn and testified on behalf of the plaintiff and defendant, and the court having heard the testimony and having made Findings of Fact and Conclusions of Law herein,

Now therefore: It is ordered and adjudged:

I.

That the plaintiff have and recover from the defendant the sum of $28,700.60 with interest at the rate of 6 per cent per annum, from the 1st day of July, 1946, amounting to the sum of $2544.74, and

with interest at the rate of 6 per cent per annum on the total sum of $31,245.34 from the date hereof.

II.

That the plaintiff have and recover from the defendant their costs and disbursements herein amounting to the sum of $357.00.

Dated this 29th day of December, 1947.

/s/ ANTHONY J. DIMOND,
District Judge.

To the foregoing the defendant objects and an exception is allowed defendant.

Dated December 29th, 1947.

/s/ ANTHONY J. DIMOND,
District Judge.

[Endorsed]: Filed December 29, 1947.

[Title of District Court and Cause.]

SUPPLEMENTAL MEMORANDUM OF COSTS AND DISBURSEMENTS

Disbursements

Clerk's Fees	$ 21.00
Witness Fees and Mileage	336.00
Total	$357.00

United States of America,
Territory of Alaska,
Third Division—ss.

George B. Grigsby, being duly sworn, deposes and says: That he is the Attorney for the Plaintiff in the above-entitled cause, and as such is better informed relative to the above costs and disbursements, than the said plaintiffs. That the items in the above-memorandum contained are correct, to the best of this deponent's knowledge and belief, and that the said disbursements have been necessarily incurred in the said cause.

/s/ GEORGE B. GRIGSBY.

Subscribed and sworn to before me, this 13th day of January, A.D. 1948.

[Seal] /s/ M. E. S. BRUNELLE,
Clerk of the District Court, Territory of Alaska, Third Division.

[Endorsed]: Filed January 13, 1948.

[Title of District Court and Cause.]

ORDER

It appearing to the Court from the records and files herein that judgment was rendered in the above-entitled action, in the above-entitled Court on the 29th day of December, 1947, in favor of the plaintiff and against the defendant for the sum of Thirty-One Thousand Two Hundred Forty-Five

and 34/100 Dollars ($31,245.34) with interest on said sum from the date of said judgment at the rate of six per cent (6%) per annum until paid together with costs and disbursements on the date of said judgment, amounting to the sum of Three Hundred Fifty-seven Dollars ($357.00) and

It further appearing that on the 14th day of January, 1948 an execution was issued on said judgment by the Clerk of said Court and placed in the hands of the United States Marshal for the Territory of Alaska, and that on the 9th day of March, 1948, the said Marshal made his return on his said execution to the Clerk of this Court and delivered to the said Clerk of this Court the sum of Thirty-Two Thousand Two Hundred and 35/100 Dollars, ($32,200.35) being the proceeds of levies made by said Marshal by virtue of said execution which has been applied by the Clerk of this Court, to the satisfaction of said judgment.

There further appearing that there was on the date of said levies due and owing to the plaintiff on said judgment, the sum of Thirty-One Thousand Two Hundred Forty-Five and 34/100 Dollars ($31,-245.34) together with interest on said sum at the rate of six per cent (6%) per annum from December 29, 1947 to the date of said levies to wit: February 26, 1948, amounting to the sum of Two Hundred Ninety-Six and 50/100 Dollars ($296.50) and the sum of Three Hundred Fifty-Seven Dollars ($357.00) costs, and the further sum of Six Dollars ($6.00) accrued costs as appears from the return of the United States Marshal of said execution amount-

ing in all to the sum of Thirty-One Thousand Nine Hundred Four and 84/100 Dollars ($31,904.84), Now, Therefore,

It Is Ordered and Directed that the Clerk of this Court pay from the moneys so placed in his hands as aforesaid by the United States Marshal to the plaintiff, C. R. Monaghan, or his attorney, George B. Grigsby, the sum of Thirty-One Thousand Nine Hundred Four and 84/100 Dollars ($31,904.84) and that the balance remaining to wit: the sum of Two Hundred Ninety-Five and 51/100 Dollars ($295.51) be returned to the defendant.

Dated March 10, 1948.

/s/ ANTHONY J. DIMOND,
District Judge.

[Endorsed]: Filed March 10, 1948.

[Title of District Court and Cause.]

PETITION FOR ALLOWANCE OF APPEAL

To: The Honorable Anthony J. Dimond, Judge of The District Court for the Third Division, Territory of Alaska:

Your petitioner, Matanuska Valley Farmer's Cooperating Association, a corporation, respectfully shows:

1. Petitioner is the defendant in the above-entitled cause.

2. Final judgment was entered in the above-entitled cause against petitioner and in favor of C. R. Monaghan, the plaintiff, on the 29th day of December, 1947.

3. Petitioner considers that it has been aggrieved by the judgment made and entered in this cause on the 29th day of December, 1947, as above set forth.

Wherefore, Petitioner prays that an appeal may be allowed from the judgment above-mentioned, to the United States Circuit Court of Appeals for the Ninth Circuit, and in connection with this petition, petitioner presents herewith his assignments of error.

Dated this 25th day of March, 1948.

EDWARD V. DAVIS and
WILLIAM W. RENFREW,
Attorneys at Law, Anchorage, Alaska, Attorneys for the Defendant, and Petitioner,

By /s/ EDWARD V. DAVIS.

[Endorsed]: Filed March 25, 1948.

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Comes now Matanuska Valley Farmers Cooperating Association, a corporation, defendant and appellant herein, and files the following assignments of error, upon which it will rely in the prosecution

of its appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the final judgment made and entered in this cause on the 29th day of December, 1947, by the above-entitled Court, as follows, to wit:

1. That the Complaint upon which plaintiff's action was based and under which evidence was introduced on behalf of the plaintiff and which is the basis for the judgment rendered as above set forth, does not state facts sufficient to constitute a cause of action.

2. That the Court erred in finding:

(a) As in its second finding of fact: "That the plaintiff and his assignors named in the Complaint herein * * *" in that no assignment from any of the individuals named in the various causes of action of plaintiff's Complaint, to the plaintiff, C. R. Monaghan, was presented to the Court, save and except an assignment by one Harold Thuma.

(b) As in its third finding of fact by setting forth the provisions of paragraphs three, four, five, six and seven of marketing contract, and failing to find as to other provisions of such contract, applicable to the case in question and in particular, the preamble of such contract, and paragraphs one, eight, twelve, fourteen, nineteen, and twenty thereof.

(c) As in its fourth finding of fact: "That in accordance with the provisions of paragraphs five and six of said contract as above set forth, the defendant elected to and did, during all the period

beginning December 1, 1944 and ending November 30, 1945, pool and co-mingle * * * * * *'' insofar as said finding may be considered as being a finding by the Court, that defendant corporation had organized a ''milk pool'' and as a finding that any persons except Harold Thuma had assigned claims to plaintiff.

(d) As in its fifth finding of fact: ''* * * * * * for which defendant promised and agreed to pay plaintiff and his assignors according to the provisions of paragraphs six and seven of the said contract, that is to say an amount representing plaintiff's interest and the interest of plaintiff's assignors in all milk and milk product resold by defendant with which plaintiff's milk was pooled and co-mingled, and the proceeds thereof, after making deductions to cover the items mentioned and stated in paragraph seven of the said contract.

''That the defendant pooled and co-mingled the milk so as aforesaid, sold and delivered to the defendant by plaintiff and his assignors, with the milk sold and delivered to the defendant by others and resold the same as thus co-mingled; that by reason of the premises, there became due and owing to the plaintiff and his assignors from the defendant, on the first day of July, 1946, after deduction of the items stated in paragraph seven of said contract, the aggregate sum of Twenty-eight thousand Seven Hundred and 60/100 Dollars ($28,700.60), no part of which has been paid,'' in that such finding ignores the defenses raised by the defendant in this case

and is not supported by sufficient evidence and is contrary to the evidence of the case, and in that there is not sufficient competent evidence to support the finding that the plaintiff is entitled to recover any sum of and from the defendant in this action and that there is no competent evidence to support the finding of the Court that the plaintiff and his assignors were entitled to receive from the defendant the aggregate of $28,700.60 or any part thereof or any sum at all, either on the first day of July, 1946, or at any other day or that no part of any sum due to the plaintiff from the defendant had been paid by the defendant, or that any parties save and except Harold Thuma had assigned any claims to plaintiff. That such finding is contrary to law and not in accordance with the provisions of the marketing contract between plaintiff and defendant and is not supported by any competent evidence introduced in this cause.

(e) As in its sixth finding of fact: "That for a valuable consideration and prior to the commencement of this action, the plaintiff's said assignors in this Complaint herein, sold and assigned the plaintiff their respective interest in the aforesaid aggregate sum of $28,700.60 and plaintiff is now the owner thereof," in that there is no competent evidence before the Court that the plaintiff and his so-called assignors were entitled to the sum of $28,-700.60 or any part thereof from the defendant and that such finding is contrary to the evidence. That there is no competent evidence of any assignment

except as to Harold Thuma nor is there any evidence of consideration or of ownership.

(f) As in its seventh finding of fact: "That prior to the commencement of this action, the plaintiff and his said assignors, demanded of defendant the payment of the sums respectively due each of them, but defendant has failed, neglected and refused to pay the same or any part thereof, and the same are still due, owing and unpaid, together with interest according to law," in that the evidence in this cause failed to support such finding, and that such finding is contrary to the evidence.

And to each of which said findings, defendant excepted and said exceptions were allowed.

3. That the Court erred in failing and refusing to find in this matter:

(a) That defendant, Matanuska Valley Farmers Cooperating Association, in the period December 1, 1944, to and including November 30, 1945, elected to and did purchase milk from plaintiff and his so-called assignors at a flat delivery price on its own account in accordance with the provisions of paragraph five and eight of the Members Standard Marketing Contract.

(b) That the Court erred in failing to find that the plaintiff and his so-called assignors have been paid in full for all the milk delivered to defendant in the period in question.

(c) That the Court erred in failing to find, in the event the Members Standard Marketing Agree-

ment and the evidence should disclose in the opinion of the Court, that some money was due to plaintiff for milk sold in the period in question, that the amount due to plaintiff was limited to his share of the net proceeds of the sale of milk and milk products after taking into consideration all the debts and obligations and operation and maintenance expenses of the defendant corporation rather than, as apparently found by the Court, that plaintiff was entitled to recover his proportionate share of the so-called profit of the dairy department of defendant corporation and without taking into consideration liabilities and expenses of operating and maintaining defendant corporation as a whole.

(d) That the Court erred in failing and refusing to find that if plaintiff is entitled to recover anything at all in this action, that reasonable charges for the services of receiving, handling and selling agricultural products under paragraph five of the Standard Marketing Contract were not limited to charges actually incurred in handling plaintiff's milk, and other milk purchased by the defendant.

(e) That the Court erred in failing to find that defendant in this action was entitled to elect as to whether payment to plaintiff and his so-called assignors for milk should be made according to the provisions of paragraph seven of the Standard Marketing Contract or on an out and out purchase basis by the defendant at a flat delivery price in accordance with the provisions of paragraph five and eight of the Marketing Contract and that the defendant did elect to purchase plaintiff's milk and

that of the other milk producers on the basis of a flat delivery price and that any further payment to plaintiff and his so-called assignors on account of such milk should be limited to distribution of profits of the corporation, according to the volume of products furnished to the corporation by the producers, as the undisputed evidence shows has always been done by the defendant corporation.

4. That the Court erred in forming its conclusions of law as follows:

(a) Conclusion of Law numbered one: "That the plaintiff is entitled to recover from the defendant the sum of $28,700.60, being the sum due and owing to plaintiff as set forth in paragraphs V and VI hereof, together with interest at the rate of six per cent per annum from the sixth day of July, 1946," to which conclusion of law, defendant excepted and said exception was allowed, for the reason that such conclusion of law is contrary to law under the evidence introduced in this case.

5. The Court erred in rendering its judgment for the plaintiff, C. R. Monaghan, and against the defendant, Matanuska Valley Farmers Cooperating Association, in this matter. The Court's errors in this regard were based on the following errors of the Court occurring during the trial of the case: All of the errors herein assigned, to wit: Assignments of error, one, two, three, four and five, inclusive.

Wherefore, defendant and appellant prays that the judgment in the above-entitled cause be reversed and the cause be remanded with instructions to the

trial court as to further proceedings therein and for such other and further relief as may be just in the premises.

Dated this 25th day of March, 1948.

EDWARD V. DAVIS and
WILLIAM W. RENFREW,
Attorneys at Law of Anchorage, Alaska, Attorneys for the Defendant and Appellant,

By /s/ EDWARD V. DAVIS.

[Endorsed]: Filed March 25, 1948.

[Title of District Court and Cause.]

ACKNOWLEDGEMENT OF SERVICE

The undersigned Attorney for plaintiff and respondent herein hereby acknowledges receipt of true copies of each of the foregoing documents, to wit:

1. Petition for Allowance of Appeal.
2. Assignment of errors.
3. Order allowing appeal.
4. Order extending time for preparing and filing record on appeal and to settle bill of exceptions.
5. Citation on appeal.

Dated at Anchorage, Alaska, this 25th day of March, 1948.

/s/ GEORGE B. GRIGSBY,
Attorney for Plaintiff.

[Endorsed]: Filed March 26, 1948.

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

The Petition of Matanuska Valley Farmers Co-operating Association, a corporation, defendant in the above-entitled action for an appeal from the final judgment rendered therein is hereby granted and the appeal is allowed.

It Is Further Ordered that petitioner in this matter may, if it chooses so to do, deposit with the Clerk of this Court the sum of Two Hundred Fifty Dollars ($250.00) in lieu of cost bond on appeal and such deposit may be returned to petitioner upon the filing by petitioner of a good and sufficient cost bond on appeal in the manner provided by law, such bond to be approved by the Clerk of this Court.

Dated at Anchorage, Alaska, this 26th day of March, 1948.

/s/ ANTHONY J. DIMOND,
District Judge.

[Endorsed]: Filed March 26, 1948.

[Title of District Court and Cause.]

CITATION ON APPEAL

To the Plaintiff C. R. Monaghan and to His Attorney, George B. Grigsby.

You and Each of You are hereby cited and admonished to be and appear in the United States

Circuit Court of Appeals for the Ninth Circuit to be held at San Francisco, in the State of California, forty days from the date of the within citation pursuant to the order allowing appeal on file in the Clerk's Office of the District Court for the Territory of Alaska, Third Division and in that certain action pending in the said Court, entitled C. R. Monaghan, plaintiff, vs. Matanuska Valley Farmers Cooperating Association, a corporation, defendant, number A-4252, wherein Matanuska Valley Farmers Cooperating Association is appellant and you are the appellee, to show cause if any there be, why the judgment rendered against Matanuska Valley Farmers Cooperating Association should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Anthony J. Dimond, District Judge for the Territory of Alaska, Third Division, this 26th day of March, 1948, and of the independence of the United States the year one hundred seventy-two.

/s/ ANTHONY J. DIMOND,
Judge of the District Court
For the Third Division.

Attest:

[Seal]: /s/ M. E. S. BRUNELLE,
Clerk of Said Court.

[Endorsed]: Filed March 26, 1948.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR PREPARING AND FILING RECORD ON APPEAL AND TO SETTLE BILL OF EXCEPTIONS

This matter coming on for hearing upon the application of the defendant, Matanuska Valley Farmers Cooperating Association, requesting 75 days additional time to prepare and file the record on appeal in the above-entitled cause and to settle the bill of exceptions; it is hereby

Ordered that the defendant, Matanuska Valley Farmers Cooperating Association, have 75 days additional time, to wit: until the 8th day of June, 1948 within which to prepare, file or have approved the records and bill of exceptions in the above-entitled cause.

Done in open court at Anchorage, Alaska, this 26th day of March, 1948.

/s/ ANTHONY J. DIMOND,
District Judge.

[Endorsed]: Filed March 26, 1948.

[Title of District Court and Cause.]

MOTION FOR EXTENSION OF TIME FOR PREPARING AND FILING RECORD ON APPEAL AND PREPARATION AND SETTLEMENT OF BILL OF EXCEPTIONS AND FOR ENLARGEMENT OF THE JUDGMENT TERM FOR THE PURPOSE OF PREPARATION AND FILING AND DOCKETING OF THE RECORDS AND PREPARATION AND FILING OF BILL OF EXCEPTIONS

Comes now Matanuska Valley Farmer's Cooperating Association, a corporation, the above-named defendant, and requests of the Court an Additional period of sixty (60) days from and after the 8th day of June, 1948, previously set by the Court as the time for filing the record and bill of exceptions in the above-entitled matter for preparation and filing of such record and of such bill of exceptions in the above-entitled cause and that the judgment term may be extended for the purpose of such preparation and filing.

This motion is based on all the records and files of this action and upon the affidavit of Edward V. Davis, one of the attorneys for the defendant and appellant.

Dated at Anchorage, Alaska, this 28th day of May, 1948.

DAVIS & RENFREW,
Attorneys for the Defendant
and Appellant.
By /s/ EDWARD V. DAVIS.

[Endorsed]: Filed May 29, 1948.

[Title of District Court and Cause.]

AFFIDAVIT

United States of America,
Territory of Alaska,
Third Judicial Division—ss.

Edward V. Davis, being first duly sworn, upon his oath deposes and says:

That he is one of the attorneys for the defendant and appellant, Matanuska Valley Farmer's Cooperating Association, a corporation; that on or about the 26th day of March, 1948, the above-entitled Court made its order allowing appeal in this matter to the Circuit Court for the Ninth Circuit at San Francisco, California, and on the same day entered its order extending time for preparation and filing record on appeal and for settlement on bill of exceptions in this matter; that a considerable period of time before such 26th day of March, 1948, affiant ordered a transcript of the proceedings in this matter from the Court reporter, but that due to press of other business, the Court reporter has been unable, to the present date, to furnish such transcript; that as affiant is informed and believes and so alleges the fact to be, the transcript in the above-entitled matter will be ready within the next few days for delivery to affiant; that affiant is unable to properly prepare this matter on appeal and to prepare the matters for making up the official record to be docketed in the case and for the preparation of bill of exceptions in the matter until he has

had an opportunity to study the official transcript prepared by the reporter in the matter and that as affiant believes, it will take at least sixty (60) days after the transcript is delivered to prepare and file the record in this case, and prepare and settle and file the bill of exceptions in the cause.

This affidavit is made in support of defendant's motion for extension of time for preparing and filing and docketing record on appeal and for preparation and settlement of bill of exceptions and for extension of the judgment term pending such preparation, filing and settling.

/s/ EDWARD V. DAVIS.

Subscribed and sworn to before me this 28th day of May, 1948.

[Seal] /s/ WILLIAM W. RENFREW,
Notary Public for Alaska.

My Commission Expires August 12, 1949.

[Endorsed]: Filed May 29, 1948.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR DOCKETING APPEAL

This matter coming on for hearing upon the application of the defendant, Matanuska Valley Farmer's Cooperating Association, requesting an additional sixty (60) days time from and after the 8th

day of June, 1948, within which to prepare, file and docket the record on appeal in the above-entitled cause and within which to prepare and settle and file bill of exceptions in the matter and requesting an extension of the judgment term for the purpose of preparing and filing and docketing such papers and such records, and the Court having read the Affidavit of Edward V. Davis, one of the attorneys for the defendant, together with the Court file, and the Court being fully advised in the premises; Now, Therefore,

It Is Hereby Ordered, Adjudged and Decreed that that the defendant and appellant, Matanuska Valley Farmer's Cooperating Association, shall have and it is hereby granted a period of sixty (60) days additional time from and after the 8th day of June, 1948, within which to prepare, file and docket the record on appeal in the above-entitled cause and within which to prepare, settle, and file bill of exceptions in the said cause and the judgment term is hereby extended for that purpose for a period of sixty (60) days from and after the 8th day of June, 1948.

Done in open Court this 29th day of May, 1948.

/s/ ANTHONY J. DIMOND,
District Judge.

[Endorsed]: Filed May 29, 1948.

[Title of District Court and Cause.]

STIPULATION OF COUNSEL RELATING TO EXHIBITS

It is hereby stipulated and agreed by and between counsel for plaintiff and counsel for defendant in the above-entitled matter that a printed duplicate of Members Standard Marketing Agreement introduced as plaintiff's Exhibit 1 in this cause may be included in the Bill of Exceptions as plaintiff's Exhibit 1, rather than a typewritten copy of such contract.

It is further stipulated and agreed by and between counsel that defendant's Exhibit 2, being a booklet containing Articles of Incorporation and By-Laws of the Matanuska Valley Farmer's Cooperating Association, may be included as defendant's Exhibit 2 in the Bill of Exceptions, by including therein a booklet containing such Articles of Incorporation and By-Laws in its printed form, rather than a typewritten copy thereof, such booklet included as defendant's Exhibit 2 in the Bill of Exceptions being a duplicate booklet to the one introduced into evidence as defendant's Exhibit 2.

Dated this 5th day of August, 1948.

/s/ EDWARD V. DAVIS,
Of Defendant's Attorneys.

/s/ GEORGE B. GRIGSBY,
Plaintiff's Attorney.

[Endorsed]: Filed August 5, 1948.

MINUTE ORDER ENTERED JULY 28, 1948

M. O. Withdrawing Official Court File

[Title of Cause.]

No. A-4252

Now at this time upon motion of Edward V. Davis, of counsel for defendant,

It is ordered that cause No. A-4252, entitled C. R. Monaghan, plaintiff, versus Matanuska Valley Farmers Cooperating Association, a corporation, defendant, with exhibits thereto, be, and they are hereby, withdrawn from the official court file.

MINUTE ORDER ENTERED AUGUST 5, 1948

M. O. Extending Time To File Objections To Proposed Bill of Exceptions

[Title of Cause.]

No. A-4252

Now at this time upon motion of George B. Grigsby, counsel for plaintiff, by and through Edward V. Davis, of counsel for defendant, and with counsel for defendant not objecting thereto; the plaintiff not being present nor represented, the defendant not being present but represented by Edward V. Davis, of its counsel,

It is ordered that the plaintiff in cause No. A-4252, entitled C. R. Monaghan, plaintiff, versus Matanuska Valley Farmers Cooperating Association, a corporation, defendant, be, and he is hereby, allowed until

the end of the summer recess of this court to file objections to the proposed bill of exceptions presented by defendant, and defendant allowed 30 days after bill of exceptions settled to file and docket cause with the Ninth Circuit Court of Appeals.

MINUTE ORDER ENTERED AUGUST 5, 1948

M. O. Receiving Bill Of Exceptions

[Title of Cause.]

No. A-4252

Now at this time the plaintiff not being present or represented by counsel, the defendant not being present but represented by Edward V. Davis, of its counsel,

Whereupon Edward V. Davis, of counsel for defendant presented to the Court for settlement the proposed bill of exceptions for and in behalf of the defendant in cause No. A-4252, entitled C. R. Monaghan, plaintiff, versus Matanuska Valley Farmers Cooperating Association, a corporation, defendant, and the Court received the same and directed that said bill of exceptions be filed.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE OBJECTIONS AND AMENDMENTS TO PROPOSED BILL OF EXCEPTIONS

This cause coming on upon the application of the plaintiff herein for an order extending time within which the plaintiff may file amendments and objections to the proposed Bill of Exceptions filed herein, and good cause appearing therefor,

It is ordered that the time within which the plaintiff may serve and file amendments and objections to the proposed Bill of Exceptions on file herein is hereby extended to and including the 21st day of September, 1948.

Dated September 2nd, 1948.

/s/ ANTHONY J. DIMOND,
District Judge.

[Endorsed]: Filed September 2, 1948.

[Title of District Court and Cause.]

PROPOSED AMENDMENTS TO BILL OF EXCEPTIONS

Amendment No. 1,

That there be added to the second page of the Bill of Exceptions filed herein, the following statement:

That copies of the exhibits introduced in evidence

by the respective parties, namely Plaintiff's Exhibits 1 to 18 inclusive, and Defendant's Exhibits 1 to 10, inclusive, are hereunto attached and made a part of this Bill of Exceptions.

Amendment No. 2,

That the word "identification" be omitted wherever the same occurs on any of the exhibits.

Amendment No. 3,

That there be written at the top of each page of Plaintiff's Exhibit 6, the words "Plaintiff's Ex. 6, Page ....." inserting the appropriate page number.

Amendment No. 4,

That there be written at the top of each page of Defendant's Exhibit 1, the words, "Defendant's Exhibit, Page .....," Inserting the appropriate page number.

/s/ GEORGE B. GRIGSBY,
Attorney for Plaintiff.

Service admitted October 15th, 1948.

/s/ EDWARD V. DAVIS,
Attorneys for Defendant.

[Endorsed]: Filed October 15, 1948.

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated and agreed by and between counsel for plaintiff and counsel for defendant, above-named, that the Bill of Exceptions presented by the defendant-appellant, consisting of Reporter's Transcript of Proceedings, including the opinion of the Judge, and copies of exhibits introduced on behalf of plaintiff and on behalf of defendant, as amended at the suggestion of plaintiff and according to the stipulation dated April 14, 1950, is a full, true, correct and accurate statement of all the evidence introduced at the trial of this cause, and is hereby approved.

It is further stipulated and agreed that the said Bill of Exceptions may be amended by the Clerk of this Court insofar as the amendments are concerned, in accordance with the suggestions of the plaintiff, and in accordance with the stipulation of the parties dated April 14, 1950.

It is further stipulated and agreed that the said Bill of Exceptions, including the opinion of the Judge and including copies of exhibits, may be brought on for hearing before the Court without further notice and that an immediate hearing be had upon the same, and that the same may be approved and settled by the Court as the Bill of Exceptions in the above-entitled cause.

Dated at Anchorage, Alaska, this 14th day of April, 1950.

DAVIS & RENFREW,
Attorneys for Defendant,

By /s/ EDWARD V. DAVIS.

/s/ GEORGE B. GRIGSBY,
Attorney for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed April 14, 1950.

[Title of District Court and Cause.]

ORDER APPROVING, CERTIFYING AND SETTLING BILL OF EXCEPTIONS

Matanuska Valley Farmers Cooperating Association, a corporation, defendant-appellant in the above-entitled cause, having applied to this Court for an order approving and certifying the Bill of Exceptions in the above-entitled matter, to be used on defendant's appeal to the Court of Appeals for the Ninth Circuit, from that certain judgment entered in the above-entitled matter on the 29th day of December, 1947, and it appearing that plaintiff, through his counsel, has made certain amendments to the Bill of Exceptions as presented, and that the parties, through their respective counsel, have stipulated that the Clerk of this Court may change the Bill of Exceptions in accordance with such amendments, and it further appearing that the plaintiff

and defendant, by and through their respective counsel, have stipulated that the said Bill of Exceptions, as amended, consisting of Reporter's Transcript of Proceedings, including oral opinion of the Judge, and including copies of the exhibits introduced on behalf of the plaintiff and on behalf of the defendant, is a true and accurate statement of all the evidence introduced on the trial of such cause, and have stipulated and agreed that the said Bill of Exceptions may be brought on for hearing and settlement and certification, without further notice, and that an immediate hearing may be had upon the same, and it further appearing that said Bill of Exceptions contains Reporter's Transcript of Proceedings, including the oral opinion of the Judge in this matter, together with copies of all exhibits introduced on behalf of the plaintiff and on behalf of the defendant at the trial, and that such Bill of Exceptions is complete and correct;

Now, therefore, the Court, having examined said Bill of Exceptions, and being fully advised in the premises, it is therefore Ordered that the said Bill of Exceptions as amended by the Clerk in accordance with stipulation of the parties, shall be and the same is hereby approved and settled as the Bill of Exceptions upon the appeal of the defendant, Matanuska Valley Farmers Cooperating Association, a corporation, to the Court of Appeals for the Ninth Circuit, and

It is further ordered that this order shall be deemed and taken as a certification of the undersigned Judge of this Court, who presided at the

hearing of said cause and before whom all the evidence in said cause was given, that the said Bill of Exceptions contains Reporter's Transcript of all the evidence given on the trial of the cause and includes the oral opinion of the Court in the matter and includes all the Exhibits introduced on behalf of both of the parties at the trial and includes all matters upon which the judgment of the Court, dated December 29, 1947, was based.

It is further ordered that, in accordance with the order entered by this Court on the 5th day of August, 1948, the defendant-appellant is allowed thirty days from the date of this order within which to file its record and docket the appeal with the Court of Appeals for the Ninth Circuit.

Done by the Court and order entered this 14th day of April, 1950, at Anchorage, Third Division, Territory of Alaska.

/s/ ANTHONY J. DIMOND,
District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed April 14, 1950.

[Title of District Court and Cause.]

STIPULATION RE SETTLEMENT OF BILL OF EXCEPTIONS

It is hereby stipulated by and between counsel of record for the plaintiff-respondent and the defendant-appellant, respectively, that the amendments listed below proposed by plaintiff-respondent to the "Bill of Exceptions" (Transcript) heretofore filed herein by the defendant-appellant, shall be allowed, and the Bill of Exceptions (Transcript) settled in accordance herewith.

In conformity with the order of the above-entitled Court, dated August 5, 1948, the defendant-appellant shall be allowed thirty days after such settlement of the Bill of Exceptions (Transcript) to file the record and docket its appeal with the Circuit Court of Appeals, Ninth Circuit.

1) That copies of the Exhibits introduced by the respective parties, namely plaintiff's exhibits one (1) to eighteen (18), inclusive, and defendant's exhibits one (1) to ten (10), inclusive, shall be attached to such Bill of Exceptions (Transcript) and made a part thereof;

2) That the word "identification" be stricken wherever it occurs in any of the exhibits;

3) That there be written at the top of each page of plaintiff's exhibits the words "Plaintiff's Exhibit ..... page .....," inserting the appropriate number of exhibit and the page thereof;

4) That there be written at the top of each of defendant's exhibits, the words "Defendant's Exhibit ..... page .....," indicating the number of exhibit and the page thereof.

Dated this 14th day of April, 1950.

/s/ EDWARD V. DAVIS,
Of Attorneys for Defendant-Appellant.

/s/ GEORGE B. GRIGSBY,
Attorney for Plaintiff-Respondent.

[Endorsed]: Filed April 14, 1950.

[Title of District Court and Cause.]

STIPULATION RE EXHIBITS

It is hereby stipulated by and between the attorneys of record for the plaintiff-respondent and defendant-appellant, respectively, that an order may be entered herein authorizing the Clerk of the above-entitled court to transmit to the United States Court of Appeals for the Ninth Circuit all exhibits admitted in evidence at the trial of this cause as the same are set forth in the original volume III of

the Transcript of Proceedings (Bill of Exceptions) in the above-entitled cause.

/s/ EDWARD V. DAVIS,
Attorneys for Plaintiff-Respondent.

/s/ GEORGE B. GRIGSBY,
Attorneys for Defendant-Appellant.

[Endorsed]: Filed May 9, 1950.

[Title of District Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the District Court for the Territory of Alaska, Third Division:

You are hereby requested to forward the record in the above-entitled cause to the United States Court of Appeals for the Ninth Circuit, pursuant to an appeal taken in such cause, such record to include the entire record, including reporter's transcript of the evidence, and exhibits introduced in the cause contained in the bill of exceptions settled by the Court in the matter, and including specifically the following documents:

1. Complaint.
2. Answer.
3. Minute order dated February 15, 1947 setting trial.

4. Minute orders dated March 13, March 14, April 7, April 8, May 16, and July 15, 1947, respectively, having to do with the trial of the cause.
5. Motion to amend complaint in open case to conform to evidence.
6. Brief and argument of plaintiff filed August 14, 1947.
7. Argument on behalf of defendant.
8. Reply brief and argument of plaintiff.
9. Minute order dated November 21, 1947, oral decision of the Court in favor of plaintiff and against defendant.
10. Findings of Fact and Conclusions of Law dated December 29, 1947.
11. Judgment in favor of plaintiff and against defendant dated December 29, 1947.
12. Cost bill.
13. Supplemental cost bill.
14. Execution, including Marshal's return.
15. Notice of levy of execution.
16. Petition for allowance of appeal.
17. Assignment of errors.
18. Acknowledgment of service.
19. Order allowing appeal.
20. Citation on appeal.
21. Order extending time for docketing appeal.
22. Transcript of oral opinion.
23. Motion for extension of time for docketing appeal.
24. Affidavit in support of above motion.
25. Order extending time for docketing appeal.

26. Stipulation concerning copies of plaintiff's Exhibit 1 and defendant's Exhibit 2.
27. Minute order extending time to file objections and for docketing appeal.
28. Minute order dated August 5, 1948, concerning filing of bill of exceptions.
29. Order extending time to file objections and amendents to bill of exceptions.
30. Proposed amendments to bill of exceptions.
31. Stipulation concerning settlement of bill of exceptions.
32. Order approving and certifying bill of exceptions.
33. Stipulation concerning exhibits.
34. Bill of exceptions, volume one, transcript of evidence.
35. Bill of exceptions, volume two, transcript of evidence.
36. Bill of exceptions, volume three, exhibits.
37. Stipulation re exhibits.
38. Appellant's designation of contents on record on appeal.
39. This Praecipe.
40. Clerk's certificate of record.

Respectfully submitted,
/s/ EDWARD V. DAVIS,

Of Attorneys for Appellant Matanuska Valley Farmers Cooperating Association.

Receipt of copy acknowledged.

[Endorsed]: Filed May 9, 1950.

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF CONTENTS OF RECORD ON APPEAL

To the Clerk of the above-entitled Court:

Pursuant to Rule 75(a) of the Rules of Civil Procedure, as amended, the defendant-appellant, Matanuska Valley Farmers Cooperating Association, hereby designates as the contents of the record on appeal the complete record and all the proceedings and evidence in the above-entitled action.

/s/ EDWARD V. DAVIS,
Attorneys for Defendant-Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed May 9, 1950.

[Title of District Court and Cause.]

BILL OF EXCEPTIONS

Volume One

Be it remembered: The above-entitled cause came on regularly for trial on the 13th day of March, 1947, before the Honorable Anthony J. Dimond, Judge of the above-entitled Court at Anchorage, Alaska, the plaintiff appearing in person and by his attorney, George B. Grigsby, and the defendant being represented by Edward V. Davis, of his counsel, and the parties having theretofore stipu-

lated that the cause should be tried to the Court without a jury, the matter was tried commencing on the 13th day of March, 1947, and continued on the 14th day of March, on the 7th day of April, on the 8th day of April, on the 15th day of July, 1947, and the evidence was closed on the 15th day of July, 1947. During the course of the trial, certain evidence was introduced and certain exhibits were admitted into evidence on behalf of the respective parties all as will more fully appear from the following reporter's transcript of proceedings and exhibits, which contain all the evidence adduced and all exhibits admitted at the trial.

That thereupon and on the 15th day of July, 1947, the matter was continued for the filing of briefs by the respective parties and after the filing of such briefs, the Honorable Anthony J. Dimond, Judge, on the 21st day of November, 1947, rendered his oral opinon in the cause finding for the plaintiff and against the defendant and directed counsel for plaintiff to prepare Findings of Fact and Conclusions of Law and Judgment, in the matter in accordance with such opinion, all as will more fully appear from the transcript of such opinion included in the reporter's transcript of proceedings hereinafter set forth.

In the District Court for the Territory of Alaska
Third Division

No. A-4252

C. R. MONAGHAN,

Plaintiff,

vs.

MATANUSKA VALLEY FARMERS COOPERATING ASSOCIATION, a Corporation,

Defendant.

TRANSCRIPT OF PROCEEDINGS

GEORGE B. GRIGSBY, Esq.,
Attorney for Plaintiff.

MESSRS. DAVIS AND RENFREW,
Attorneys for Defendant.

This cause came on regularly for trial at approximately 10:00 o'clock a.m. of Thursday, March 13, 1947, before the Honorable Anthony J. Dimond, Judge of the above-entitled court.

Opening statement to the Court was had by George B. Grigsby, for and in behalf of the plaintiff.

Opening statement to the Court was had by Edward V. Davis, for and in behalf of the defendant.

The Court: Witness may be called.

Mr. Grigsby: Call Mr. McAllister.

FRANK McALLISTER

being first duly sworn, testified for and in behalf of the plaintiff as follows: [1*]

Direct Examination

By Mr. Grigsby:

Q. State your name to the Court, Mr. McAllister.

A. Frank McAllister.

Q. You are the plaintiff in this action? You are the plaintiff?

A. No, Mr. Monaghan is the plaintiff.

Q. Oh no, you are not the plaintiff. I was a little bit confused about that. Now, I will show you this paper, Mr. McAllister, and will you look at it and tell the Court what it is?

A. It is a marketing contract signed by the president of the Board and directors and the secretary and myself entered into, I think it was '39.

Q. Marketing contract between the——

A. Matanuska Valley Cooperating Association and——

Q. Cooperative Association, is it not?

A. Cooperating.

Q. And that is your signature, is it?

A. This is my signature here.

Mr. Grigsby: Your Honor, we offer it in evidence and I will ask counsel if one of the forms can go in instead of this.

Mr. Davis: Yes. What is the date? You are not particularly interested in the dates—you just want to get one of the forms before the Court?

* Page numbering appearing at bottom of page of original Reporter's Transcript.

(Testimony of Frank McAllister.)

Mr. Grigsby: Yes. This is dated June 30, 1939.

The Court: You wish that admitted and another substituted?

Mr. Grigsby: A blank form substituted; It will answer the [2] purpose.

Mr. Davis: Yes, I have no objection to it.

The Court: This will be marked Plaintiff's Exhibit No. 1. It should be marked and then it can be withdrawn.

Mr. Grigsby: Can I have this marked as an exhibit and then substitute the copy?

The Court: Yes, I think that would be better and maybe the form could be filled in so as to correspond with the original.

Mr. Davis: Why not just offer the form as the exhibit? That is all you are after, isn't it—getting the form before the Court?

Mr. Grigsby: Yes, that's all, except I want to prove the contract has been admitted.

Mr. Davis: We have admitted that in our answer and we will admit it now, if it will help any.

Mr. Grigsby: Very well, and may the record show a blank form was substituted for the original contract?

The Court: Very well. The contract was made between Mr. McAllister and the Association?

Mr. Grigsby: Yes.

The Court: And what was the date?

Mr. Grigsby: June 30, 1939.

(Testimony of Frank McAllister.)

(Plaintiff's Exhibit No. 1 admitted in evidence.)

The Court: One more thing: I understood you to say this was [3] the contract made with the cooperative association, is that right?

Mr. Grigsby: Yes; it speaks for itself.

The Court: The defendant here is Cooperating Association. I suppose that will be explained as we go along.

Mr. Grigsby: Well, maybe this witness can do that.

Mr. Davis: I think maybe I can clear that up. The association name is "Cooperating Association." The contracts made are on the form of contract printed years ago when the name was still "Cooperative Association," but we are all talking about the same thing. They changed their name to comply with the law.

The Court: When was the name changed?

Mr. Davis: I think it was '37 or '38—I haven't the date down.

Court: I think I understand. You may proceed, Mr. Grigsby.

Mr. Grigsby: Of course, Paragraph I of the complaint alleges, "that the Matanuska Valley Farmers Cooperating Association"—which is the name of the defendant organization.

The Court: The new corporation simply used the old forms?

Mr. Grigsby: And alleges "formerly known as

(Testimony of Frank McAllister.)

Matanuska Valley Farmers Cooperative Association."

The Court: Very well. I think I understand.

Mr. Grigsby: Well, what has been your business since you signed that contract, Mr. McAllister?

A. Well, for two or three—I think it was three years—it was primarily vegetables, and the last five years it has been /2/ [4]

Q. Where? A. In the——

Q. In the Matanuska Valley?

A. In the Matanuska Valley.

Q. And since—when did you go in the dairy business? A. Five years ago.

Q. And since then has that been your principal business? A. It has.

Q. And have you dealt with this defendant corporation with reference to the milk produced by you? A. I have.

Q. And sold them your milk? A. I have.

Q. And to no one else? A. No one else.

Q. Now, I will ask whether or not you sold your milk to the defendant under the terms and conditions of this agreement that has been put in evidence? A. I did.

Q. That's what you considered that you sold it under, is that right?

A. That's our understanding.

Q. Mr. McAllister, in this complaint it is alleged that some 19, 20—22, to be correct—dairymen assigned their certain claims against the Matanuska Valley Farmers Cooperative Association to the

(Testimony of Frank McAllister.)

plaintiff, C. R. Monaghan. Do you know anything about that? A. I do.

Q. Do you know whether or not that was done?

A. It was done.

Q. I will ask you who procured that to be done?

A. Mr. Monaghan and myself.

Q. Together? A. Had the papers, yes.

Q. And did—state whether or not you know that the persons [5] named in all these causes of action—and I might read them to you so as to get it in the record—now, you assigned your claim, did you, to Mr. Monaghan? A. I did.

Q. For the purposes of this law suit?

A. I did.

Q. In a written instrument? A. I did.

Mr. Grigsby: Perhaps counsel will stipulate that this assignment was made and show it in the record?

Mr. Davis: I wonder if the assignments themselves don't speak for themselves and if they wouldn't be the best evidence.

Mr. Grigsby: Do you know where that assignment is?

A. Well, as I recall it was left at your office.

Q. Did I prepare the assignment in a form with lines on it and give it to you? A. Yes, you did.

Q. And did Mr. Monaghan get the signatures of these men named in the complaint?

A. Yes, we did.

Q. Now, do you know what you did with them?

A. Well, Mr. Monaghan had it and, as I recall, we came to town to see you and left—you asked for

(Testimony of Frank McAllister.)

that and we left it up at the office. Now, that's as I remember it.

Q. And you don't know where it is?

A. I don't know where it is.

Q. Did you receive a letter from me, or did Mr. Monaghan show you a letter in which I cautioned you to be sure to bring it to this trial?

A. I have a letter to that effect—or Mr. Monaghan has it—I will correct that. [6]

Q. And so you don't know where it is?

A. I don't.

Mr. Grigsby: I guess I will have to take the stand, your Honor, and testify that I can't find it. You know it was executed, however?

A. I know it was executed.

Mr. Davis: Have you a copy of it?

Mr. Grigsby: I can't find any trace of it.

Mr. Davis: I don't mean the original; I mean a copy.

Mr. Grigsby: I presume it is mislaid—put in the wrong place somewhere in my office—and I probably will have to take the stand if you require strict proof that it can not be found. It is testified to here it was signed.

Mr. Davis: I don't think there is any point, your Honor, in making Mr. Grigsby take the stand and testify in effect that it can't be found. I am interested in knowing what the stipulation looks like and I can't, of course, stipulate they all signed it because I haven't seen it and don't know.

The Court: Well, the witness can testify, and

(Testimony of Frank McAllister.)

if necessary to make the record complete you may take the stand later. But go ahead with this witness and supply the defects later.

Mr. Grigsby: Now, every year have you sold all your milk——

The Court: Wait just a minute. I think the witness should testify first whether all these parties involved actually signed the assignment, if he knows. Do you know whether everyone whose claim is included in the complaint in this action actually signed an assignment of his claim to the plaintiff in this action, Mr. [7] Monaghan?

The Witness: I will have—if I could see the names——

The Court: Did Merle L. Anderson?

The Witness: He signed it.

The Court: Signed the assignment? Next is A. A. Rempel.

The Witness: He has signed.

The Court: Third is Arvid Johnson.

The Witness: He signed.

The Court: Maybe I skipped one—well, the next one is——

Mr. Grigsby: I found this in a list, your Honor.

The Court: Very well, proceed.

Mr. Grigsby: Jack Cope? A. He signed.

Q. William Ising? A. He signed.

Q. Joseph Lentz? A. He signed.

Q. Clarence Quarnstrom?

A. I know he signed.

Q. Sir? A. He signed.

(Testimony of Frank McAllister.)

Q. Thomas Moffit? A. He signed.
Q. Paul Nelson? A. He signed.
Q. B. J. Lossing? A. He signed.
Q. Chet Liebing? A. He signed.
Q. Alvin J. Collier? A. He signed.
Q. William Lentz? A. He signed.
Q. Henning Benson? A. He signed.
Q. Walter C. Huntley? A. He signed.
Q. Lawrence Plumley? A. He signed. [8]
Q. H. S. Bauer? A. He signed.
Q. A. R. Moffitt? A. He signed.
Q. Leonard Bergan? A. He signed.
Q. Harold Thuma?

A. He signed—no, we didn't have that and present it to him at the time. It was just agreed after talking to him after that paper was handed in that he agreed to take part in the action.

Q. He has not yet signed it?

A. He did not sign, no.

The Court: What is his name?

Mr. Grigsby: Harold Thuma. Did he agree to sign? A. He agreed to take part.

Q. Did he agree to the assignment, or was the assignment delivered to me before that?

A. The assignment was delivered to you before that. He did not agree to sign, as I recall, because you said if he agreed to take part in the action it wouldn't be necessary.

Q. All right.

The Court: What is his name?

Mr. Grigsby: Harold Thuma.

(Testimony of Frank McAllister.)

Mr. Davis: The last cause of action.

The Court: Very well. Go ahead.

Mr. Grigsby: Mr. McAllister, I asked you, or started to ask you, if you, since you have been in the dairy business, have sold all your milk to the Matanuska Valley Farmer's Cooperative Association? A. I have. [9]

Q. And I believe you stated you sold it under the terms of this contract that has been introduced in evidence? A. I did.

Q. Did you ever sell them any milk for a flat price? A. I did not.

Q. Have you been advanced money when you delivered milk on the account of the purchase price?

A. I have.

Q. And that's every year? A. Every year.

Q. Now, for instance in the year 1945—the year in question—were you advanced money on account of the purchase price of the milk that you sold and delivered to the defendant corporation?

A. I did.

Q. You were? A. I was.

Q. And just tell the Court how they advanced that, periodically, and the method used?

A. Well, on the 5th and the 20th of the months we were paid the advance, whatever at the time—the price changes at times; there is a larger payment for winter milk to stimulate winter production, and it usually goes down a little bit in the summer time, but we're paid on the 5th and 20th of each month on our advances.

(Testimony of Frank McAllister.)

Q. In other words, now, do you deliver your milk or have it delivered to them every day?

A. I have it delivered.

Q. And where do they receive it?

A. At Palmer.

Q. At Palmer? And do you have a record of the poundage that you delivered? A. I have.

Q. Furnished—on each delivery do you weigh it in?

A. It is weighed in but we get the poundage on the 5th——

Q. Do you get a——

A. Twice a month—We get the weigh slip at the same time we get paid.

Q. You don't get it every day?

A. We don't get get it every day.

Q. Now, you said on the 5th and the 20th they make you a payment on the milk delivered?

A. They do.

Q. Does that apply to all the months of the year? A. All the months of the year.

Q. And that goes on to and including the month of November, 1945, did it? A. It did.

Q. Now, after November 30, 1945, did you ever get any further payment for the milk you delivered to the defendant in the fiscal year of '45

A. You say after——

Q. Did you ever get any further payment than what was advanced to you monthly from December 1, '44, to November 30, '45? A. No.

(Testimony of Frank McAllister.)

Q. Now, in 1944 did you sell to the defendant under the same system? A. I did.

Q. Now, during that year did you get your payment bi-monthly? A. Yes.

Q. What you call an advance? A. Yes.

Q. Now, after the close of that fiscal year were you subsequently made additional payment?

A. I was.

Q. And in '43 were you made payments after—or did you have the same system then?

A. The same system. [11]

Q. Have you received those advances every year you have dealt with the defendant?

A. I did, up until '45.

Q. Yes, except this year? What years does that include? When did you go in the dairy business?

A. I got my first one in '42.

Q. Now, in '42, '43 and '44, of those fiscal years did you receive additional payments over and above the payments advanced? A. I did.

Q. After the books were audited, is that right?

A. Yes.

Q. And did they ever furnish you a statement of the deductions which fixed the final payment, or did you have access to the books to see that, or was it explained?

A. It was explained. We had access to the books, but I never took advantage of it.

Q. Who was the manager during those years?

A. Well, there were three, I believe. There was

(Testimony of Frank McAllister.)

Mr. Stock, and Mr. Snodgrass, and then—of course, that was this year—I guess there was just two.

Q. Mr. McAllister, do you remember being with me at the co-op office sometime last summer in which we asked for the figures—at which time we asked for the figures showing the amount of money that was advanced to the milk producers for their sales of 1945? A. I remember.

Q. I will show you this statement. Are those the figures they gave us?

A. Those are the figures.

Q. You were with me and asked for the total amount advanced [12] to the milk producers in 1945? A. Yes.

Q. Who furnished us with that?

A. Michalson. He was the accountant at that time.

Q. He was the accountant and auditor?

A. Well, they call him accountant, I think. He is not the auditor.

Q. Now, do you know what amount you were advanced, during the fiscal year 1945, being the period from December 1, '44, to November 30, '45?

A. In actual figures, I don't.

Q. I will show you this statement and ask if you have seen that before? A. Yes.

Q. And did you procure that statement?

A. From Mr. Michalson, yes.

Q. Who, at that time, was the bookkeeper?

A. Yes.

Q. And accountant at the office? Now, did that

(Testimony of Frank McAllister.)

purport to be a statement of the amount of moneys advanced to the people interested in this law suit? Is that what we asked for?

A. That was what we asked for.

Q. And this is what you got?

A. This is what we got.

Mr. Grigsby: We offer this in evidence, Mr. Davis. (Handing document to Mr. Davis.)

Mr. Davis: Is this only to be considered as to his testimony? There are one or two on this list that are not interested in this suit.

Mr. Grigsby: Well, we haven't claimed they are,—Mr. Snodgrass and, possibly, Mr. Thuma—but as to those who are [13] interested it is a statement furnished by the defendant.

The Court: Well, it may be admitted and it will be considered only as to those who are parties to this action.

Mr. Grigsby: Yes, your Honor.

(Plaintiff's Exhibit No. 2 admitted in evidence.)

PLAINTIFF'S EXHIBIT No. 2

Report of Milk Sold During Period from Dec. 1, 1944, to Dec. 1, 1945, by the Following Persons:

Name	Pounds Grade A	Pounds Grade B	Amount	Bonus	2% Reduction
1. Frand McAllister	168,842		$10,749.83	$ 20.90	$ 215.02
2. C. R. Monaghan	119,488		7,852.34	23.62	157.08
3. Merle L. Anderson	130,910	8,657	9,488.77	101.04	189.79
4. A. A. Rempel	48,925		2,486.54	59.41	49.73
5. Arvid Johnson	95,567		6,421.13	122.25	128.43
6. Jack Cope	67,321		4,534.78	49.15	90.66
7. Wm. Ising	85,157		5,633.51	36.06	112.67
8. Joseph Lentz	42,856		2,887.66	16.06	57.74
9. Clarence Quarnstrom	33,595		2,618.62	16.67	52.37
10. Thomas Moffitt	81,451	1,601	5,483.40	58.11	109.66
11. Paul Nelson		36,170	1,966.25	19.27	39.35
12. B. J. Lossing	52,053		3,586.31		71.71
13. Chet Liebing	1,475	36,557	2,266.45	36.31	45.32
14. Alvin J. Collier		9,851	569.80		11.41
15. Wm. Lentz	58,303	4,219	4,090.99	14.40	81.84
16. Henning Benson		32,299	1,729.33	36.58	34.60
17. Walter C. Huntley	32,236		2,252.75	54.77	45.05
18. Lawrence Plumley		15,790	857.15		17.15
19. H. S. Bauer		6,196	353.90		7.07
20. A. R. Moffitt	63,949		4,424.54		88.50
21. Leonard Bergan		2,643	157.97		3.16
22. M. D. Snodgrass	101,927		6,824.88	78.49	136.50
23. Harold Thuma		23,004	1,319.46	21.60	26.40
	1,184,055	176,987	$88,556.36	$764.69	$1,771.21

Audited Theodore Michalson (Signed)

[Endorsed]: Filed August 5, 1948.

(Testimony of Frank McAllister.)

Mr. Grigsby: I don't think it need be read now, Mr. Davis?

Mr. Davis: No, I don't think we need to read any of them.

Mr. Grigsby: Now, I don't know whether I asked this question or not, Mr. McAllister, but could you remember in 1944 what percentage of the price of your milk was paid after the close of the fiscal year? This is '44 we are talking about.

A. It was either 43 per cent or 42. It was—there was two years there—I can't say just exactly. It was either 42 or 43 per cent—and some tenths per cent.

Q. Mr. McAllister, do you know whether or not demand has been made on the defendant—well, wait a minute. I will ask you whether or not recently you asked the defendant, or its officers, for a statement of their accounts with the dairy farmers and the produce department for the years 1946 and 1945? A. I did.

Q. And was it furnished? A. It was.

Q. Who furnished it to you?

A. Mr. Allyn. He is the present accountant.

Q. He is the accountant? I will show you this paper and ask you if that is the statement he furnished you? A. That is. [14]

Mr. Grigsby: We offer this in evidence, Mr. Davis. '46 isn't necessarily material there, but we can hardly segregate the two. Have you any objection to this going in for the purpose of showing the statement reported by Mr.——

(Testimony of Frank McAllister.)

Mr. Davis: No. I don't think it is competent as to '46, but so far as '45 is concerned, I have no objection.

Mr. Grigsby: It is taken off the books, your Honor, which will be in put in evidence, but this is probably——

The Court: It is used, as I understand, to cover '45?

Mr. Grigsby: '45. Now, I wish to——

The Clerk: What is this called?

Mr. Grigsby: It is called Plaintiff's Exhibit 3.

The Clerk: I mean, describe it—Account of fiscal year 1945 and 1946?

Mr. Grigsby: Of milk producers and others.

(Plaintiff's Exhibit No. 3 admitted in evidence.)

(Testimony of Frank McAllister.)

Plaintiff's Exhibit No. 3

	1946 Fiscal Year		1945 Fiscal Year	
	Dairy and Creamery	Produce Dept.	Dairy and Creamery	Produce Dept.
Sales	$395,104.24	$127,849.23	$361,145.56	$101,697.97
Cost of goods sold	219,674.39	126,379.12	178,422.88	76,976.05
Gross Profit on sales	175,429.85	1,470.11	182,722.68	24,721.92
Expenses				
Operating expenses	80,925.42	25,536.27	83,807.54	40,045.42
Indirect overhead	50,418.06	6,293.80	45,121.31	4,995.62
Net profit from operations	44,086.37	*30,359.96*	53,793.52	*20,319.12*
Rent from apartments in dairy building	3,391.11	.....	3,207.75	.....
Department earnings	*47,477.48	*30,359.96*	*57,001.58	*20,319.12*

Condensed Profit and Loss Statement
Matanuska Valley Farmers Co-operating Assn.
For Fiscal Year 1945 and 1946

	1946	1945
Sales	$1,060,084.19	$1,091,439.21
Cost of goods sold	727,244.49	761,792.25
Gross profit on sales	332,839.70	374,646.96
Expenses		
Operating expenses	221,241.69	246,888.05
Indirect expenses	125,599.60	128,653.39
Net profit from operations	*14,001.59*	*894.48*
Rental income	9,616.11	3,783.75
Net profit/*loss* for the year	*4,385.48*	*2,889.27

* These figures fictitious in that no adequate allowance for repairs which were postponed during these years nor has any provision been made to date to meet a loan of $200,000 due in approximately 35 more years (term 40 year).

	Average price paid to producer for milk per cwt.
For the fiscal year 1946	$7.06
For the fiscal year 1945	6.49

[Italics were shown in red.]

[Endorsed]: Filed August 5, 1948.

(Testimony of Frank McAllister.)

Mr. Grigsby: Now, I wish to read this to the Court now.

(Mr. Grigsby read first part of Plaintiff's Exhibit No. 3 to the Court.)

Q. Now, Mr. McAllister, you have testified that amount of money advanced, in payment for the goods sold, all the dairy farmers, according to the slip furnished by the bookkeeper down there, was about $136,000, is that right? A. That's right.

Q. Now, in this statement which has been put in evidence, the cost of goods sold, dairy and creamery, is put at $178,000 instead of 136. Can you account for the difference?

A. Well, [15] the difference is accounted for by powdered milk and butter and eggs.

Q. And now the powdered milk and butter, would that be purchased from the dairy farmers?

A. No, it would not.

Q. Where is that purchased?

A. That is purchased from Seattle—Outside.

Q. And might that difference account for other items? A. Well, it might.

Q. Purchased in connection with the operation of the creamery?

A. Purchased in connection with operation of the creamery, yes.

(Mr. Grigsby then read rest of Plaintiff's Exhibit No. 3 to the Court.)

Mr. Grigsby: I would like to state to Mr. Davis —(Consulted at counsel table with Mr. Davis.)

(Testimony of Frank McAllister.)

The Court: Court will stand in recess until 10 minutes past three.

(Whereupon recess was had at 3:01 o'clock p.m.)

After Recess

Mr. Grigsby: Mr. McAllister, I will show you this paper and ask you what that is?

A. That is a profit and loss statement that we asked Mr. Allyn to get up for us, for '44.

Q. For '44? Mr. Allyn is their bookkeeper at present? A. Yes, he is their auditor.

Q. And he furnished you with this?

A. Yes, he furnished [16] Mr. Monaghan it. I was in at the time.

Mr. Grigsby: Offer this in evidence, Mr. Davis.

Mr. Davis: Might I inquire, your Honor?

The Court: Yes.

Mr. Davis: Do you know whether or not, Mr. McAllister, this statement was made up from the audit made in the year 1944? Well, here is Mr. Allyn; I will ask him: Is that made from the audit in 1944?

Mr. Allyn: Yes.

Mr. Davis: I have no objection to it.

The Court: It may be admitted as Plaintiff's Exhibit No. 4

(Plaintiff's Exhibit No. 4 admitted in evidence.)

(Testimony of Frank McAllister.)

Plaintiff's Exhibit No. 4

Matanuska Valley Farmers Co-Op Association
Condensed Profit/Loss Statement by Department
F. Y. 1944

	Produce Dept.	Creamery Dept.
Sales	$268,806.78	$262,955.79
Cost of goods sold	240,106.53	129,729.54
Gross profit on sales	28,700.25	133,266.25
Operating expenses	23,600.35	45,499.92
Indirect overhead	8,999.18	24,333.97
Net earnings of department	*3,899.28*	63,432.36
Rents		3,528.67
Total Departmental	*3,899.28*	66,961.03

[Italicized figures shown in red.]

Matanuska Valley Farmers Co-Operating Association
Condensed State of Profit and Loss
F. Y. 1944

Sales	$1,303,343.64
Cost of goods sold	950,196.04
Gross profit on sales	353,147.60
Expenses	
Operating expenses	192,820.88
Indirect overhead	104,720.57
Net profit on operations	55,606.15
Rental income	5,974.12
Net income for fiscal year	$ 61,580.27

Subject to same qualifications and remarks as previous statement for the years 1945 and 1946.

[Endorsed]: Filed August 5, 1948.

(Testimony of Frank McAllister.)

The Court: May I ask a question while you are waiting? Referring to Plaintiff's Exhibit No. 3, Mr. McAllister, I notice one column is headed "Produce Department." What does the word "produce" include, do you know?

Witness: Vegetables of all kinds, from potatoes——

The Court: Eggs too?

The Witness: No, just vegetables of all kinds.

The Court: Where are the eggs carried in that statement?

The Witness: The eggs are carried under "Creamery."

The Court: Under "dairy?"

The Witness: Under "dairy."

The Court: All right, Mr. Grigsby.

Mr. Grigsby: Now, with reference to this paper I just handed [17] you, there is an item here "Cost of goods sold, Creamery and Dairy Department, $129,729.54." Does that include advances made to you that year bi-monthly? A. It's in '44?

Q. In '44. A. Yes.

Q. Does it also include other goods bought by the creamery down there such as powedered milk, and so forth, as in the '45 statement? A. Yes.

Q. So you were not advanced for you milk the full sum of $129,000? A. No.

Q. Now, those advances for the year '44 were during the period expiring November 30, 1944?

A. Yes.

(Testimony of Frank McAllister.)

Q. After that did you receive additional payments? A. I did.

Q. And substantial additional payments?

A. Yes.

Q. What percentage?

A. It was either 43 or 42—42 or 43 per cent.

Q. Now, was that paid to you as a dividend?

A. It started as a pool—as final—or it started first as a first payment on the 1944 pool, and the second was the final payment on the 1944 pool.

Q. Now, when you received these payments during the year, you stated you got the poundage and you got a check bi-monthly, is that correct?

A. That is correct.

Q. Drawn on a bank?

A. Well, we would get a voucher. We don't get a check—voucher for it and we cash them at the office.

Q. Down there? A. Down there. [18]

Q. Have you any of those vouchers with you?

A. No, they are all cashed.

Q. Mr. Monaghan, have you any vouchers? (Got something from man in back of court room.) I will ask you to look at these vouchers and state whether or not those were what you referred to as the vouchers you got, or part of the vouchers?

A. That is on the pools, yes. That is part—the check is attached to that.

Q. The voucher is attached to that?

A. The check is attached to this voucher, or vice versa.

(Testimony of Frank McAllister.)

Q. Well, you said "check"; I asked you what bank and you said it was a voucher.

A. Well, you asked, as I recall, were the checks paid monthly?

Q. Yes.

A. Well, we don't have these on the checks paid monthly. We just have a voucher—on the pool. This is on the pool.

Q. Well, bi-monthly you went to the office, is that right, and received a voucher—is that right, for the milk you had sold?

A. It isn't a check, you see.

Q. A voucher? A. Yes.

Q. And were these stubs attached to vouchers?

A. No, not on the monthly checks. Those are the pool checks. In other words, we don't get checks that can be cashed at any banks on a monthly basis only, but when they pay off the pool they give us a check which is signed by the manager and they can be cashed [19] at a bank. But on monthly checks we just get a voucher and you cash them—you can't cash them at a bank, but you can cash them at the office.

Q. But there was a check attached to each of these?

A. Oh, those—those are on the pools, as they paid the pools out.

Q. Do you have your stubs corresponding to these at home? A. I have.

Q. Mr. McAllister, during the recess I had a conversation with you about the demand being made

(Testimony of Frank McAllister.)

for this profit of $57,001. Now, have you an association of dairymen? A. We have.

Q. And can you state whether or not that association appointed a committee to present this claim to the defendant?

A. Well, this association has been formed quite recently and this came up—we had a dairy group acting as more or less representative of the dairymen that we met periodically, but until—oh, probably three months ago, we didn't incorporate, or start to incorporate, as an association. I mean, it's—before that time we just had a group of dairymen working together, and that we did, meeting with the Board, ask or demand this payment.

Q. And you demanded what?

A. The payment of the pool.

Q. Who did you make that demand of?

A. There was four——

Q. The Board of Directors?

A. There was four of the Board of Directors.

Q. Is that a majority of the Board of Directors?

A. It is.

Q. Who was there?

A. Well, Virgil Eckert, and Stock and [20] Clarence Huffman—I can not recall the other one, though.

Mr. Grigsby: I think that's all. Mr. Davis may have this witness. I will ask permission to recall him if I have overlooked anything.

The Court: You may examine, Mr. Davis.

(Testimony of Frank McAllister.)

Cross-Examination

By Mr. Davis:

Q. Now, Mr. McAllister, you have been a member of the co-op, then, since about 1939, haven't you?

A. I have.

Q. And for the first three or four years you spent a major portion of your effort on the produce department? A. Yes.

Q. And during that time were you delivering any milk at all? A. No.

Q. You started delivering milk along about 1942? A. I did.

Q. And since that time I think you said that a major portion of your effort has gone toward milk, since 1942? A. That's correct.

Q. Now, you also, though, still deliver produce, don't you? A. No.

Q. How about 1945? A. I did.

Q. Didn't you deliver considerable produce to the co-op in 1945? A. $600.00.

Q. Weren't you one of the larger of the lettuce producers that year? A. I was not.

Q. $600.00 worth altogether?

A. It was approximately that. It could be some cents or—— [21]

Q. Now, I think you stated awhile ago that you have been paid, from time to time you have been paid advances. I wish you would tell the Court a little about the mechanics of getting those advances, as you call it.

(Testimony of Frank McAllister.)

A. I don't believe I understand what you mean.

Q. Well, I will try to make it clearer: How do you go about getting these bimonthly advances you are talking about—twice monthly advances?

A. How go about it? I don't go about getting them. You are just paid your checks, if that is what you mean.

Q. All right, that is what I mean. You don't have anything to do with getting those at all; they just automatically come, don't they?

A. They do.

Q. According to the amount of milk you have delivered that month? A. That is correct.

Q. Do they mail them to you, or send them with your truck driver?

A. No, they are left at the creamery and you go to the creamery and get them.

Q. And they are, Mr. McAllister, based on the milk you deliver in that partcular two weeks, aren't they? A. That's correct.

Q. At a fixed price, are they not?

A. Not a fixed price.

Q. What do you mean by, not a fixed price, now? How do they go about fixing these so-called advances?

A. Well, that is on a fixed price. You are advanced so much for a hundred pounds of milk. [22]

Q. That's right. Now, what you mean to say by "not a fixed price" is that it varies from time to time? A. No.

(Testimony of Frank McAllister.)

Q. What's that?

A. I don't mean it that way. I mean it is an advance.

Q. Well, you concluded it was an advance, all right, but I want the Court to know what is done so we will see what he thinks it is. Now, you don't go to the Board and tell them, each two weeks: "Here, I need so much money" and they give you so much money? A. No.

Q. They just pay you a fixed price per hundred pounds for the milk delivered in that two weeks, isn't that right? A. That is correct.

Q. And then you mentioned awhile ago that in the winter time you get some kind of an incentive bonus. That's correct, isn't it?

A. That's correct.

Q. In the year in question here—in 1945—that bonus amounted to 50c a hundred pounds, I believe, between, say, November and February of 1944—November '44 and February '45, isn't that right?

A. I don't recall the exact figure, but it is approximately that.

Q. All right, without recalling the exact figure, you do get a winter bonus of some kind?

A. That's right.

Q. As an incentive to produce more milk during the winter when it is short?

A. That's correct.

Q. Have you ever been charged any interest on these so-called [23] advances? A. Have we?

Q. Have you? A. No.

(Testimony of Frank McAllister.)

Q. Have you ever been charged a service charge for handling your products?

A. What do you mean by——

Q. Well, I will try to make it clear, now: You gave a statement—you identified a statement here a minute a go that had the amount that you received on that during the particular year in question. The amount you received—I believe, Mr. McAllister, that you received $9948.57 in money for the year 1945. That is substantially the right figure, isn't it? A. That is approximately.

Q. Then in addition to that—I believe you have somebody else haul your milk to town?

A. That is right.

Q. And your milk hauler also is paid his hauling fee out of your money, isn't he?

A. That is correct.

Q. So you received that in addition to the $9,948 that you received in money?

A. That is correct.

Q. And then you bought some items at the store or at the garage that were charged off to you as merchandise deductions?

A. I bought that at the creamery.

Q. At the creamery itself? A. Yes.

The Court: What was that? I didn't get it.

Mr. Davis: In this particular year, your Honor, he was charged $16.20, I think it was, for something he bought at the creamery that was taken out as a deduction—a merchandise [24] deduction.

The Court: Very well.

Mr. Davis: So you actually, then, have received

(Testimony of Frank McAllister.)

—you add up all these various charges I have mentioned here, the money you were paid in cash, the money that was paid to your hauler and the money that was paid for the merchandise deductions—add all those together and you come out at the figure that was on the sheet you presented awhile ago as the payment made to you for 1945. That's correct, isn't it? A. That's correct.

Q. Now then, you have been largely a milk producer during the years 1942 through '46?

A. Well, in '42 and '43 I sold considerable vegetables, but largely, there was milk.

Q. Yes, my choice of words was unfortunate there. You have sold milk to the co-op since '42?

A. Yes.

Q. I didn't mean to try to confuse you. Now, during that time you apparently are perfectly satisfied with the settlement that has been made up to the year '45? A. That is correct.

Q. Is that correct? A. That is correct.

Q. Do you know how the dividends, or whatever you may call them—pool checks—whatever they may be, at the end of the year—do you know how those figures were arrived at?

A. I know only what we were told at the regular meeting of the audit. I know how it was arrived at, is that what you mean?

Q. Yes, that's what I mean. You do know how it was arrived at?

A. I do know how it was arrived at. [25]

Q. Now, there is an item of two per cent that

(Testimony of Frank McAllister.)

they have been deducting from your milk, isn't there? A. That's correct.

Q. According to the terms of some procedure they have set up? Can you tell the Court whether or not that two per cent is figured on the money you have received, or on the gross price of the milk sold to me as a consumer, for instance?

A. It is on money received by me.

Q. On money received by you? All right, and at the end of 1943 you got some money back; you don't remember whether it was, I think you said, either 43 or 44 per cent?

A. It was in the neighborhood of that.

Q. One year you got 43 and one year you got 44, I think?

A. I think I said 42 and 43, but it is in the neighborhood.

Q. Yes, I am interested here in the procedure rather than in the exact amount.

The Court: Are you talking about '43 now?

Mr. Davis: '43 and '44, your Honor.

The Court: From December 1, 1943 to November 30, '44?

Mr. Davis: No, when I say "'43" I mean beginning December 1, '42—that would be the fiscal year, and then fiscal '44—and fiscal '45 is the one we have under discussion here.

Do you know what that percentage that you got was based on in fiscal '43 and fiscal '44? Was the percentage based on the amount that you had previously received?

A. Why, it was based on a dollar basis. It was

(Testimony of Frank McAllister.)

based on the amount of milk which we [26] had sold on a dollar basis.

Q. Yes, the amount of money you had previously received from the milk? A. That's correct.

Q. How many men are there in the dairymen's association?

A. Well, I could just give you approximately—39 or 40.

Q. Well, there's only 35 or 40 milk producers altogether, aren't there?

A. Maybe I didn't understand your question.

Q. I want to know how many men there are in this dairymen's association you are talking about.

A. Well, I don't really know. The last meeting there was some more—which was just two or three days ago—some more come in and I don't know how many.

Q. Would it be all the fellows involved in this suit? A. No.

Q. Would there be some people who aren't involved in this suit but who are milk producers?

A. There would.

Q. Would it be about half the total dairymen in an association?

A. It may possibly—I doubt if it is quite half. It may be.

Q. Approximately 15 or 20 people in your dairymen's association? A. That's correct.

Q. Now, when you and your committee went and talked to the Board of Directors was that a Directors' meeting? A. No.

(Testimony of Frank McAllister.)

Q. Just an informal meeting?

A. Just an informal meeting.

Q. And you told them you want this $57,000?

A. Correct.

Q. And what did they say?

A. Well, there was considerable said—I don't recall all that was said. [27]

Q. What was the purport? I don't expect you to recall the conversation.

A. Most things I remember, was one of the facts that the Board felt that actually—the members there felt that actually the money was coming to the dairymen, but they didn't know where the money was coming from. They didn't know whether they could morally, or according to the contract, pay it or not.

Q. In other words, it was something to this effect, wasn't it: We would like to see you fellows get a dividend here, but we have had losses in other departments, obligations to meet and we have no money to pay——

Mr. Grigsby: Object to the question, your Honor, as apparently a trick question incorporating the word "dividend" and trying to trap the witness.

The Court: Overruled.

Mr. Grigsby: The opening statement of counsel has stated that what they got was in the way of a dividend. Now he wants this witness to testify to it inadvertently. Let me caution the witness.

Mr. Davis: We can call it something besides a dividend, your Honor.

(Testimony of Frank McAllister.)

Mr. Grigsby: Let's be fair.

Mr. Davis: It wasn't intended as a trap question.

Mr. Grisby: He can ask leading questions, of course, but I can see the purpose—to make him testify he got a dividend.

The Court: Objection is overruled. You may answer.

The Witness: Would you state the question? I don't——

Mr. Davis: Will the reporter read the question?

(Reporter read question.)

The Witness: Well, as I recall it, as I stated before, the Board member that spoke stated that he felt morally we were entitled to the money, but he couldn't see where the money was coming from and didn't know how it could be paid.

Q. Do you remember who of the Board made that statement?

A. It was either Virg Eckert or Mr. Stock. Both of them spoke on the question and it has been considerable time ago—almost a year ago—and it is hard to recall just exactly how that has come about.

Q. Mr. McAllister, both of those men in their own right are milk producers, aren't they?

A. No, Mr. Stock isn't a milk producer.

Q. He has been one, hasn't he? A. Well, it wouldn't amount—if he produced any, it would be very, very small. He may have produced a few hundred pounds.

Q. Mr. Eckert is a milk producer now?

A. He is a producer, yes.

(Testimony of Frank McAllister.)

Q. Now then, Mr. Grigsby asked you a question, as I remember it, about this last exhibit he put in—Exhibit No. 4, I think it is—and he asked you about the statement in there as to cost of goods sold, as to whether or not the dairy farmers got all that money, and your answer was that they did not—that other things [29] went into that cost of goods sold? Now, among the other things that went into that cost, was eggs, isn't that right?

A. That is correct.

Q. In other words, the eggs are handled as a part of the dairy department?

A. That's correct.

Q. And any purchases that were made for the creamery for the manufacture of ice cream or——

The Court: Just a minute. Will you close the door? It is hard to sort out this noise.

Mr. Davis: The manufacture of ice cream or other creamery products, they are also included in that figure, aren't they, in the costs of goods sold?

A. That is correct.

Q. Your payments to the dairymen, whether we call them dividends or pools or payments on pools or payment for milk, or whatever, they are part of that cost of goods sold too?

A. That's correct.

Q. And you are quite sure that all of these plaintiffs except Mr. Thuma signed that assignment?

A. That is correct.

Q. Does that mean, Mr. McAllister, that you have no interest in this suit any more, or did you just assign it for collection? Suposing Mr. Monag-

(Testimony of Frank McAllister.)

han gets a judgment in this case, is the money his or is it to be split according to what you each feel you have coming?

A. Well, I assumed that it was to be split according to what we have coming.

Q. In other words, you have assigned these [30] claims to him so he could bring the cause of action?

A. That is correct.

Q. Because you didn't want to bring 22 different suits? But you still have an interest in the result of this suit? A. I have.

Mr. Davis: Pardon me a minute, your Honor, please. That's all, Mr. McAllister.

Redirect Examination

By Mr. Grigsby:

Q. Mr. McAllister, when you started delivering milk to the defendant between the period November 30, '44 and to December 1, '44—or December 1, '44 to November 30, '45, you have stated that you got payments biweekly, and Mr. Davis got you to say that you got a fixed price. Now, did you get a fixed price or a fixed proportion of it—or did you get anything fixed at all? Was so much per dollar given you? In other words, did you agree on the price of your milk? If you brought in a hundreds pounds of milk, did you agree on the price at the time you got that payment?

A. We didn't agree to the price. It was a price—as sales—the way it goes, they're going to pay so much as an advance——

(Testimony of Frank McAllister.)

Q. And the balance according to what terms?

A. It has always been that all money made over —that is, what we have been told—it has been explained to us, that all money made over the actual operating cost would be returned to the dairymen. That is the conditions and that's the way we have always understood it. That's the way it has been explained to us.

Q. By whom explained?

A. Mr. Stock was the one, when he was [31] manager, more or less set up this program and he explained that, as I recall, at the dairy meeting. Group of dairymen were called together; there was a little dissension over the price of milk, and Mr. Stock told us at that time that he couldn't see why there was any objection to the price of milk, that even if they had to cut the price of milk a small amount that regardless it wouldn't make any difference because all the money made over the actual operating cost would come back to us, as temporarily if they cut the price of milk we would still get the same amount.

Q. You mean if they cut the amount of advance payment?

A. If they cut the amount of advance payment we would still receive the same amount of money.

Q. Now, were you ever told by any of the Board of Directors that they felt you were entitled to a dividend in some way? Was the word "dividend" ever used?

(Testimony of Frank McAllister.)

A. I don't recall of ever using the word dividend —I never heard of it.

Q. Did anybody ever tell you in previous years to '45 that the payments made after the fiscal year were a dividend? A. No.

Q. Was it the balance of the purchase price of your milk?

A. It was, and they have called it "overage"—at different times they have called it overage.

Q. Now, this contract reads, among the deductions from the gross receipts of sales of your produce, which is milk, one of the deductions is the 2 per cent of the gross sales price received for the products of said member. Now, they made a two per cent [32] deduction? A. That's correct.

Q. Now, in answer to Mr. Davis's question you said that that was two per cent of what you received. Now, this contract which is in evidence says it is two per cent of the gross sales price received for the products of said member. Now, do you know definitely which is correct—whether they deducted two per cent of what they paid you, or two per cent of what they received on the re-sale?

A. It was two per cent of what they received.

Q. Then you were mistaken in answering Mr. Davis's question?

A. No, we don't get two per cent on the gross sales; it is two per cent on what we sell on a dollar basis. In other words, if our check is a hundred dollars, they take off on a hundred dollars. It is not on the gross sale. The gross sale, I don't know—

(Testimony of Frank McAllister.)

probably it would come to $3.00 or $4.00 if it was on the gross sale, but it is on a dollar basis—two per cent.

Q. Then in that respect they haven't conformed to this contract? A. That's correct.

Q. What is that? A. That is correct.

Q. Now, Mr. McAllister, you have stated that a part of this cost of goods sold, which is in the statement admitted in evidence, includes—that is, cost of goods sold for the dairy—for the milk farmers—includes eggs, is that right? A. That's correct.

Q. And did it also include powdered milk that they bought [33] Outside and mixed with the new product? A. That's correct.

Q. Now, do you know whether those expenditures were charged to you under the head of operating expenses?

A. I am not sure just exactly how that is——

Q. Now, you know that they charged you with a sum of—you milk farmers in the sum of $83,807.54 under what they call "operating expenses?" You know that, don't you? A. Yes. Yes.

Q. And do you know from your examination of what data has been furnished you and from talking with the management down there whether that $83,000 refers to the operating expenses of the dairy and creamery?

A. What was the figure again?

Q. Does that $83,000 mean the expenses of operating the dairy and creamery?

A. That is correct.

(Testimony of Frank McAllister.)

Q. Now, have you ever gone into detail about what that $83,000 includes?

A. Well, yes, we have discussed it a number of times.

Q. Well, does it include the expense of operating the creamery down there at Palmer?

A. It does.

Q. And does it include the salaries and wages paid in the operation of that creamery?

A. It does.

Q. In this audit of 1945 which I just got from Mr. Allyn is the item "salaries and wages, $32,-869.73." Do you know about how many people are employed there, in operating——?

A. What is that, 32,000?

Q. $32,869.73. Is there a manager of [34] the dairy and creamery? A. Yes.

Q. Does he get a salary? A. Yes.

Q. And how many people are employed at the dairy and creamery? A. At Palmer?

Q. At Palmer?

A. Four, and sometimes five.

Q. How many up here?

A. Well, I am not familiar exactly. There's either three or four here.

Q. Have you made inquiry into what that $83,-807 which is charged to you comprises?

A. Well, in discussing it last spring with the Board we discussed what that implies, but as I have to state that has been considerable time ago and figures don't remain in my head quite that long.

(Testimony of Frank McAllister.)

Q. Well, from your conversation with the management, or in your conversations with the management, does that operating expenses include the cost of supplies, such as powdered milk, eggs and everything used and consumed in connection with operating the dairy?

A. No, not in the 83,000—I don't believe it is included.

Q. What's that?

A. The meat—I mean, the powdered milk and butter and those eggs are not included in the cost of the $83,000. That's the direct overhead, or the cost of operating the dairy.

Q. Well, in operating the dairy, they have to buy commodities, don't they? They have to buy powdered milk, don't they?

A. I don't believe that comes under [35] the direct overhead.

Q. Well, what would the item "Supplies, Dairy and Creamery, $25,752" mean? What supplies would cost that?

A. Well, that would be powdered milk and butter and eggs.

Q. Well then, that is excluded, isn't it?

A. Well, I didn't understand it.

Q. Well, have you ever been in that place?

A. Yes.

Q. Do you know what supplies could be bought that would cost $83,000 if you didn't count powdered milk and butter and eggs?

A. I—no, I don't.

(Testimony of Frank McAllister.)

Q. Do they ship in butter from Outside and use it down there? A. That is correct.

Q. And mix it? A. That is correct.

Q. Now, there is charged to the operations of the dairy and creamery and deducted from your gross profit, $552.90 under the head of "Advertising." Are you familiar with that deduction or expense?

A. Yes, I know.

Q. That is charged as an operating expense?

A. Yes.

Q. There is some advertising done directly for the dairy and creamery, is that right?

A. That is right.

Q. "Commissions, $652.35"—do you know what those are?

A. I am not familiar with that, no.

Q. "Delivery Expense, $41.50"—do you know what that could refer to?

A. I can't—it's too small for any delivery that I know of, so I wouldn't know.

Q. Now, there is an item under the heading of "Operating Expenses" for the dairy and creamery, $8,442.21, "Depreciation." Of course, you don't know how they base that, do you?

A. Well, they base it on the original cost of the building.

Q. And so much a year depreciation?

A. So much a year depreciation.

Q. Now, and you are charged with "Dues and Subscriptions, $15.00." What is that?

A. Well, subscriptions, I presume, would be

(Testimony of Frank McAllister.)

gifts the co-op see fit to make to some organization or somebody in need.

Q. Now, you are charged with fuel consumed, $2209. Now, do you know what that refers to?

A. No, I don't.

Q. What fuel do they use there to operate that?

A. I was always under the impression—oh, that's the complete dairy. The dairy in Anchorage uses fuel, but the dairy in Palmer doesn't.

Q. Doesn't use fuel?

A. Their heat and light comes from the power house—or their heat and steam.

Q. All right, now, "Garbage and Ash Disposal, $15.00." There is some garbage and ash disposal?

A. Yes.

Q. "Gas, Oil and Grease, $2252?" A. Yes.

Q. What does that mean, gasoline?

A. That's gas and grease for the owners of the trucks that hauls the milk, I presume.

Q. There is an item of Laundry, $227. Now, "Lights, Power and Heat, $3,627"—now, that comes from the power plant, doesn't [37] it?

A. Yes. Well, not the light—the light doesn't come from the power house, but the heat——

Q. Where does the light come from?

A. It is bought from the Matanuska Valley Electric Association.

Q. Now, you are charged with light, power and heat, $3627. Now, that $3627 includes power from the power house? A. That's right.

(Testimony of Frank McAllister.)

Q. Do you know, is that a bigger amount than the lights—the light bill?

A. No, the power would be more than the lights.

Q. That's what I say: The power is a great deal larger amount than the light bill?

A. Yes.

Q. "Miscellaneous Expense: $234; Repairs and Maintenance, $5925; Rent in Anchorage, $542"—what is that?

A. Well, that is, I presume, the cost of the lease on the land that the creamery building is on.

Q. The co-op owns the building, doesn't it

A. Yes—got a lease——

Q. You think the 542 is the rent for the land? "Salaries and Wages, 32,000"; "Small Tools, 184"; "Supplies, $25,752.07";—now, could that include anything else, or must that necessarily include the powdered milk, the butter and eggs?

A. Well, I couldn't be sure of what it all included.

Mr. Grigsby: Well, I think that's all.

Recross-Examination

By Mr. Davis: [38]

Q. Mr. McAllister——

The Court: Do you wish to suspend until we take the recess?

Mr. Grigsby: If you Honor please, I would like to state that the dairymen who are here have a great deal of difficulty getting back and forth over the road and don't like to drive in the dark, and also

(Testimony of Frank McAllister.)

like to get down there in order to do their milking at night, and they requested an adjournment at 4:30, if possible, and we can shorten up the recess tomorrow correspondingly; but it is very dangerous driving in the dark.

The Court: Very well, you had better proceed, then, I guess.

Mr. Grigsby: So I thought we better proceed.

Mr. Davis: Mr. McAllister, you have been on the Board of the co-op? A. I have.

Q. You were on from the first part of '42, I believe, until the first part of '43?

A. That is correct.

Q. So you know pretty well how these things are handled, don't you? You were a member of the Board; you know how the thing operates?

A. You mean the co-op operates?

Q. Yes. A. Yes.

Q. Now, there hasn't been any question in your mind at all, has there, of what was being paid from time to time for milk? You have known how much a hundred pounds was being paid—or, if you would rather, advanced? There hasn't been any doubt in your mind about it?

A. Not as far as advance was concerned, no. I knew what we was going to get. [39]

Q. Yes, if you call it an advance or if you call it a payment, still you knew what it was going to be?

A. We would have to know what it was going to be.

(Testimony of Frank McAllister.)

Q. When a change was made all the milk dealers knew it, didn't they? A. Yes.

Q. At any rate, you did? A. I knew.

Q. So, when you testified a little while ago for Mr. Grigsby that you didn't know how they arrive at that, you have known all the time how they arrived at this figure, whether it is an advance or a payment, haven't you?

A. I don't believe I get it yet. Would you explain?

Q. Well, I am not trying to confuse you by trying to get you to say what you have isn't an advance. I say it is a payment and you say an advance, and I am not trying to get you to take my interpretation, but whatever it may be called, you have known all the time how that was figured? It was a definite amount per hundred pounds of milk, wasn't it?

A. It was a definite amount of money for the milk as it was received.

Q. And that price has changed from time to time since you have been in the milk business?

A. It has.

Q. It is considerably higher than it was when you first started producing?

A. Yes, that is correct.

Q. Now, you have already told me about this winter bonus business. You don't remember how much it was, but you know you [40] were paid a winter bonus? A. That is correct.

Q. And that has been true every year, I believe?

(Testimony of Frank McAllister.)

A. I wouldn't go so far as to say that, but practically every year. I don't know whether in '42 a winter bonus was paid.

Q. Well, anyway, since you have been a milk producer? A. Practically all the time.

Q. Now, while you were on the Board, you were interested in the dairymen's end, of course, because you were a dairyman, is that right?

A. That's right.

Q. I would like to ask, Mr. McAllister, if you remember a meeting held by the Board on February 10, 1943 where the following action took place:

"The meeting was again called to order at 8:30 P.M. with the same Directors present.

"In order to allow further discussion with dairymen on milk prices, a motion was made by Snodgrass, seconded by McAllister, that subject to confirmation at the next meeting, the following schedule of milk and cream prices be established, effective Dec. 1, 1942:

"Grade A Whole Milk: $5.10 per cwt for 4% milk with surplus butterfat at current landed cost of butter.

"Grade B Whole Milk: $3.75 per cwt for 4% milk with surplus butterfat at current landed cost of butter.

"Grade 1 Sweet Cream: 10c per pound over landed cost of butter. [41]

"Grade 2 Sour Cream: Landed cost of butter.

"Motion carried."

Do you remember those proceedings?

(Testimony of Frank McAllister.)

A. Well, no, I just—that's been quite a while and I don't remember.

Q. Well, do you remember taking part in a meeting where that kind of a discussion took place?

A. I remember something come up over arrangement over the price, but I don't recall.

Q. It has been too long ago?

A. It has been too long ago.

Q. If the minutes so state, would you say that the minutes are correct?

A. Yes, I would say the minutes are correct.

Q. Now then, calling your attention to the next meeting of the Directors held February 13, 1943, I will skip the part which has to do with hatchery and chickens:

" * * * Motion by McAllister, second by Brix that the new schedule of milk and cream payments be confirmed. Motion carried.

"Motion by Brix, seconded by Snodgrass, that a monthly bonus of 25c per hundredweight of whole milk be paid to producers who, during any month between Dec. 1 and May 31 of each year, bring in 80% or more of their monthly average for the remaining six months of the year. Motion carried."

Remember anything about such a discussion?

A. I remember the 80%, yes; I remember the 80%.

Q. I presume your testimony would be the same on that question: [42] if the minutes so show you you would say they were correct?

(Testimony of Frank McAllister.)

Mr. Grigsby: If the Court please, he didn't keep the minutes. That is an improper question.

The Court: Objection is sustained.

Mr. Davis: Do you remember anything about that meeting?

A. I recall the 80%. There was something on the 80%. Now, that's—but I don't recall exactly what was taking place there; I don't remember the words said or I can't recall what was said.

Q. Now then, I started to ask you awhile ago and got off on something else and didn't finish: Have you ever been charged any handling fee for handling your milk? A. Yes.

Q. Would you tell us what that fee is and how it works?

A. Well, the handling fee, as I have always understood it, is all cost in the operation of a dairy-creamery.

Q. All right now, have you as an individual ever been charged anything by way of a handling fee for handling your milk?

A. Well, isn't that a handling fee? I mean, it is a handling fee, as far as I—that would be the way I would interpret it.

Q. Well, that's the cost of doing business. Now, I want to know if you have been charged anything besides that cost for handling your milk? Have you ever been charged, say, a flat fee for a hundred pounds for handling your milk? A. No.

Q. Have you ever been charged a fee for handl-

(Testimony of Frank McAllister.)

ing your milk on any other basis, with the exception of this cost that you mention?

A. I don't recall of any other cost, no. [43]

Q. And when you said a minute ago that you have been charged a fee you mean that you, as one of the dairymen, has been charged a proportionate share of operating the dairy and creamery end?

A. Yes, that is correct.

Mr. Davis: That's all, Mr. McAllister.

Redirect-Examination

By Mr. Grigsby:

Q. Now, Mr. McAllister, do you know whether your milk that you have sold the defendant during the years you have sold them milk, was co-mingled with that of the other dairymen? A. Yes.

Q. And re-sold? A. Yes.

Q. So, there never was any separate charge made to you for handling your particular milk?

A. No.

Q. Except the hauling of it to the place you delivered it—that was charged to you?

A. Yes, hauling it to Palmer.

Q. After you delivered it, then, expense for handling, processing, selling and all other expenses connected with the final disposition of it were charged to all the dairymen as a pool, is that not so?

Mr. Davis: You are putting words in his mouth, now, Mr. Grigsby.

Q. (By Mr. Grigsby): All right. That's what

(Testimony of Frank McAllister.)

you understand the charge of $83,000 includes, is it not—the handling charge?

A. The handling charge, yes.

Q. In other words, this contract recites: " * * * reasonable [44] charges for the services of receiving, handling and selling said agricultural products * * * ."

A. That's the way it has been understood.

Q. And under that head you have been charged $83,700 approximately? A. That's right.

Q. And then you have been charged—do you know about what you have been charged indirect overhead?

A. Well, I think it was 45,000 in '45.

Q. Yes. Now, do you know as a fact, Mr. McAllister, that that handling charge which I refer to as operating expenses of the dairy, and the handling charge and operating expenses of the other units, plus what they call the indirect overhead—does that constitute all of the expense that there is?

A. In regards to——?

Q. The operation of the whole business?

A. As far as I know, the direct and indirect overhead—that is your question?

Q. That is the total expense?

A. That is the total expense.

Q. You know that you are charged with approximately 83,000—you dairymen—operating expense, don't you? A. Yes.

Q. And you know you are charged approximately 45,000 indirect overhead? A. Yes.

(Testimony of Frank McAllister.)

Q. And there isn't any other expense than those two items, is there? A. No.

Mr. Grigsby: That's all. Have you your stubs corresponding to these?

A. I haven't them with me. [45]

Q. Have you them at Palmer?

A. I have them at Palmer.

Q. And have you the stubs of the checks? You say there were checks attached to these stubs?

A. No, the co-op has those stubs.

Q. But there were checks?

A. There were checks attached to them.

Q. But the biweekly—or bimonthly payment, they were just vouchers?

A. More or less a voucher.

Q. Have you those?

A. No, you turn them in as you cash them like a check.

Q. Did you keep any stub?

A. There is no stub to those.

Mr. Grigsby: That's all. You bring what you have tomorrow. A. All right.

The Court: That is all, I think, Mr. McAllister. Another witness may be called.

Mr. Grigsby: Mr. Monaghan.

C. R. MONAGHAN

being first duly sworn, testified in his own behalf as follows:

Direct-Examination

By Mr. Grigsby:

Q. State your name?

A. C. R. Monaghan.

Q. You are the plaintiff in this action?

A. Yes, sir.

Q. I will ask you whether or not the last name on this list was the Thuma—the one mentioned here as not having signed?

A. Yes, sir, I believe it was. [46]

Q. State whether or not he authorized you to count him in with this law suit same as the rest?

A. He stated afterwards he would have been willing to join.

Q. Was that before the suit was commenced?

A. Yes, it was after I had delivered the list to your office.

Q. And before the suit was commenced?

A. As I remember it, yes.

Q. Now, you remember you instructed me after you gave me this list to drop the name of Snodgrass because he had become a member of the Board? Do you remember telling me that?

A. Well, he stated he didn't feel like he wanted to put his name—join the suit.

Q. Did he state that as a reason, that he became an official or member of the Board of Directors?

(Testimony of C. R. Monaghan.)

A. Well, he had been manager in '45 and he didn't feel——

Q. Very well. And was it at the same time that the man Thuma authorized you to count him in?

A. About that time, yes.

Q. And you neglected to have him sign?

A. Yes. I had already turned the slip in at the time I contacted him.

Q. All right now, Mr. Monaghan—we haven't very long, so I will show you these slips; is that what they are?

A. Well, there is one of them is for 1942's final payment on the milk pool.

Q. Now, all right, when did you get this?

A. It says here the 4th and 24, 1943.

Q. Well now, what's the modus operandi of your getting that? [47]

A. Well, that was after their final audit and they had got the check of the year's——

Q. Was there a check attached to this?

A. Yes, sir.

Q. And now, is this—do you know whether or not that is a final payment?

A. As I remember that was the complete payment on that one.

Q. Now, for what year's operations?

A. '42—fiscal year '42.

Q. And it is given you on the 24th of April, '43?

Q. After the audit? A. That's right.

Q. And that is a payment on butter fat you sold them in 42?

(Testimony of C. R. Monaghan.)

A. Yes, that's right.

A. Milk, principally—possibly some butterfat.

Q. Well, this says 2639 pounds butterfat?

A. Well, I guess I did sell them some cream at that time.

Q. Well, that was sold to the dairy?

A. Uh-huh.

Q. Now, here's one that reads: "Final Payment, Milk and Cream Pool, total amount purchased, $5903.09." There is no date on that.

A. Well, here's the first one that goes with that. I believe that's '43; one's for '43 and this one for '44.

Q. Well, now, this one has no date on it.

A. I remember the figures. That's 20% was the first one and the other one is for the second payment, or final.

Q. Now, this one reads: "Second 'Milk Pool' Advance: Total amount purchased, $5903.09; 20% of 'Dollar Value' purchased Less: [48] 2% Statutory Reserve; Amount of Second Advance, $1,157.01." Do you know what year that was for?

A. I would have to check with the co-op's books to show whether that was '43 or '44. I got them—I have them for the three years and I can't remember for sure whether that is '43 or '44. These are '43 or '44.

Q. Well, now, how long have you operated down there?

A. I believe I started delivering milk to the creamery, I believe it was in the spring of '42, as

(Testimony of C. R. Monaghan.)

I remember it. I had, previous to that, I had a bottle route in town.

Q. Now, you heard Mr. McAllister's testimony with reference to receiving payments on account bimonthly—twice a month? A. Yes, sir.

Q. Is that the way you got paid?

A. That is right.

Q. Well, now, was the price of your milk in dollars and cents ever fixed before the audit was made?

A. We was—I was always of the understanding that this was an advance we was receiving each pay—5th and 20th of the month—and it was on a pool basis—that we would know what we got after the audit. That is our final payment was——

Q. When you delivered your milk you got money, didn't you, twice a month?

A. Yes, sir.

Q. On your deliveries for the previous half a month? A. That's right.

Q. Now, when you did that, did you know what the price that you were ultimately to receive for your milk was—the total [49] price was to be?

A. I did not.

Q. What did that depend on?

A. Depended on the audit after the books was gone over and the——

Q. Did you sign one of these contracts?

A. Yes, sir.

Q. You have read this, haven't you—this contract? A. Yes, sir.

(Testimony of C. R. Monaghan.)

Q. And you allege in your complaint you entered into a contract of this kind, and now, have you read Paragraph (7) of this contract as to the terms of payment? A. I think I have, yes.

Q. Now, did you ever have an understanding with the association that you were to be paid in any other manner than according to Paragraph (7), and if so, what? A. I did not.

Q. Now, I will call your attention to Paragraph (8) of it: "The Asociation is hereby authorized to process or manufacture into changed or new products the products delivered hereunder * * * "

Now, do you understand that clause?

A. I believe I do.

Q. Well, would that include ice cream? Would that be a new product?

A. I presume that's one of the main products.

Q. And the Association is "authorized to process or manufacture into changed or new products the products delivered hereunder and pay the Producer as provided for in Paragraph 7, from the proceeds from resale of the changed or new products or at its discretion to pay a flat delivery price therefor * * * ." Now, did [50] you ever have any arrangement with the defendant or any of its officers to get a flat delivery price? A. I did not.

Q. Do you know of anybody else among the milk producers that ever did? Of milk?

A. I don't remember now of any of them.

Q. Now, are eggs sold to that creamery down there.

(Testimony of C. R. Monaghan.)

A. They are handled through the creamery, yes.

Q. Well, are they put into by-products?

A. Mostly put right on the market.

Q. None of them used in any of the processing goods down there? A. I doubt it.

Q. Is there powdered milk. A. Lots of it.

Q. Is there butter? A. Yes, sir.

Q. And now, can you tell the Court, where does the bulk of the milk you sell the defendant go? Is it sold as milk in town or is it sold to go to the manufacture of ice cream?

A. It principally all goes on the market, bottled.

Q. Some of your milk is co-mingled, is it, with the powdered milk and with the butter from the Outside to make ice cream with? What else do they make down there besides ice cream?

A. At present it is practically—has been at one time they made a little cottage cheese. I don't remember just when that was, but it is ice cream practically all the time.

Q. What proportion of the total sales go to the consumers here—of the milk—as compared with the proportion that goes into that creamery down there?

A. I wouldn't venture to say. I never [51] considered—you mean of raw milk?

Q. Yes.

A. Of raw milk—well, it is the biggest part of the raw milk on the public market.

Q. 90 per cent?

A. Well, I would say more than that.

Q. A small fraction goes to the creamery?

(Testimony of C. R. Monaghan.)

A. A small fraction.

Q. Were you present at a meeting between the Board of Directors and representatives of the dairy farmers that's been testified about where the matter of this profit of $57,000 came up and was demanded?

A. I was.

Q. Can you tell what took place there?

A. Well, it was discussed, and the Board members said they felt morally we were entitled to it—they just didn't know where they was legally, and, of course, they claimed they didn't have the money.

Q. Who was their spokesman?

A. Well, I don't know. They all seemed to talk for themselves pretty much.

Q. You heard Mr. McAllister's testimony with reference to a meeting where the question of advances came up. Were you at that meeting where Mr. Stock spoke?

A. I believe you are referring to the time we were discussing the price of milk?

Q. Yes. A. I was there, yes.

Q. What was that discussion about?

A. Well, as I remember it—it has been sometime ago—as I remember it it was that the co-op was considering reducing the price of milk somewhat——

Q. By that do you mean reducing the ultimate price, or just the advance?

A. No, the advance. [52]

Q. When you say "price," then, you meant "advance?" A. Yes.

(Testimony of C. R. Monaghan.)

Q. And that was what was reduced?

A. I don't say it was. At any rate, they was considering it—it come up at this meeting. I don't know whether it was called for that purpose, but it was being discussed there and the producers were objecting to it. Mr. Stock made the statement he didn't see that we had any objection; that our argument was we were making enough we didn't need to reduce it; and he said we would get it back anyway, so we had nothing to worry about.

Q. What do you mean by that? Can you explain to the Court what you mean by that? Explain what he said a little more in detail.

A. I don't know if I can use his words, but the impression I got was that he meant we would get it, just like we did for three years or so, after the audit. If the money had been made the dairymen would get the money anyway.

Q. In other words, was he trying to explain to you that it didn't make any particular difference to you that what advance you got——

Mr. Davis: Your Honor, I don't want to——

Mr. Grigsby: I will withdraw it.

Mr. Davis: This is a friendly suit and all the evidence should come out, but the witness should testify—not Mr. Grigsby.

Mr. Grigsby: Friendly, except we want $57,000 and you don't want to give it to us. Mr. Monaghan, have you other slips of [53] this kind.

A. I believe that's all I have.

(Testimony of C. R. Monaghan.)

Mr. Grigsby: We offer these slips in evidence. (Handed them to Mr. Davis.)

Mr. Davis: They are for the year '42, apparently?

Mr. Grigsby: Only some of them don't show it.

Mr. Davis: Well, I see no reason why they shouldn't go in.

The Court: They may be admitted as Plaintiff's Exhibit No. 5. Can they go in collectively?

Mr. Grigsby: They can go in collectively, and I wish to read them at this time, your Honor.

The Court: Haw many are there?

Mr. Grigsby: Four.

(Plaintiff's Exhibit No. 5 admitted in evidence.)

PLAINTIFF'S EXHIBIT NO. 5

Matanuska Valley Farmers Cooperating Association
Remittance Advice—No Receipt Required

Date of Invoice	Description	Gross Amt.	Discount or Deduction	Net Amt.
4/24/42	Final payment on milk pool			
	2627.39# butterfat @ .26804			$ 704.25
	* * * * * * * *			
	Second payment on milk pool			
	20% of dollar value $7217.99 x 20%			
	Less: 2% reserve	$1443.60	$28.87	$1414.73
	* * * * * * * *			
	Final payment—milk and cream pool			
	Total amount purchased	$5903.09		
	22.579% of "Dollar Value" purchased	$1332.86		
	Less 2% Statutory Reserve	26.66		
	Final payment			$1306.20

(Testimony of C. R. Monaghan.)

* * * * * * * *

Second milk pool advance:		
Total amount purchased	$5903.09	
20% of "Dollar Value" purchased	$1180.62	
Less 2% statutory reserve	23.61	
Amount of second advance		$1157.01

* * * * * * * *

[Endorsed]: Filed August 5, 1948.

Mr. Davis: I might suggest, Mr. Grigsby, since the Court is going to pass on these things, maybe it isn't necessary to read those. You can if you want to.

The Court: I have already read one of them and I can read the others in a minute to save your time.

Mr. Grigsby: All right, I wanted to look at those a minute. Then I will waive the reading of them. And, if the Court please, it is just half past four and it is quite important these men get away. Can we take a recess at this time?

The Court: Yes. The trial will be continued until tomorrow morning at 10 o'clock. Court now stands adjourned until tomorrow morning at 10 o'clock. [54]

(Hearing was resumed at approximately 10:00 o'clock a.m. of Friday, March 14, 1947.)

The Court: Mr. Monaghan may resume the witness stand. You may proceed with examination, Mr. Grigsby.

(Testimony of C. R. Monaghan.)

Mr. Grigsby: Yes, your Honor. Mr. Monaghan, during the year 1945, that is, the fiscal year referred to beginning December 1, 1944, and ending November 30, 1945, did you sell all your milk to the co-op?

A. I did.

Q. Referring to the defendant corporation? All the milk you produced you sold to them?

A. I did

Q. And you know as a matter of fact that that was re-sold? A. Yes.

Q. Mr. Monaghan, I will hand you Plaintiff's Exhibit 5 and call your attention to—one of these had a date on it—this part of the exhibit dated 4/24/43, being April 24, '43, "Final payment on milk pool, 2627.39# butterfat @ .26804." Was that for milk sold in '42? A. Yes.

Q. You remember that? A. Yes.

Q. Had you, previously during the year '42, received an advance on milk as you delivered it?

A. I did.

Q. That is at certain periods? A. Yes, sir.

Q. At that time were they paying on the twice-a-month system? A. Yes, sir.

Q. Now, here is an undated slip: "Final payment—Milk and Cream Pool, Total amount purchased—$5903.09; 22.579% of 'Dollar [55] Value' purchased, Less: 2% Statutory Reserve; Final Payment, $1306.20." Do you know what year that was for? A. I think that was '43.

Q. Well, do you know when you received it? In '43, or—was this for the operations of '43, you mean, or the operations of '42?

(Testimony of C. R. Monaghan.)

A. That would be for the operations of '43, yes, that is what I mean—would be received the early part of '44, I don't remember the exact date. That one that you hold in your hand is the second of two.

The Court: Let me see the first one.

Mr. Grigsby: The first one, your Honor, had nothing to do with this one.

The Court: Well, your witness says this was for '42.

Mr. Grigsby: Yes, your Honor, for the operations of '42.

The Court: I am going to mark '42 somewhere on this one, so I will know what it all means. All right now, the next one you are testifying to was that one for——

Mr. Grigsby: You say that is for operations of forty—— A. As I remember, it is '43, sir.

The Court: Let me see that.

Mr. Grigsby: Just a minute, your Honor; he said that was the second one. Which was the first one? Would that be the first one?

A. Yes, that's the first one.

Mr. Grigsby: Now, are those two payments of $1306.20 and $1157.01 both for the previous year's operations, and are they for [56] the same year, do you know?

A. They are for the same year. This is the first one because it's 20 percent.

Q. And the second is 22?

A. Yes. That's how I know——

Q. And were those payments made the year following the year when the products was delivered?

(Testimony of C. R. Monaghan.)

A. Yes, sir. They were made after the final audit.

Q. Now, on this, which was the first one?

A. This one.

Q. Now, I am referring to the slip which reads: "Second Milk Pool Advance, Total amount purchased $5903.09, 20% of Dollar Value purchased, Less: 2% Statutory Reserve; Amount of Second Advance $1157.01." Now, that's the first one you got. Now, following that, and afterwards, did you receive an additional payment?

A. Received that.

Q. And that's the final payment? A. Yes.

Mr. Grigsby: Now, your Honor, might not the witness testify those are for the year '43 operations?

The Court: I will mark '43 in the right hand corner.

Mr. Grigsby: Now, do you know what that one would be for? (Handing one to witness.)

A. That's—no, I will explain: I said that was '43. To be definite on that would mean checking with their books to correspond. Now, this one is either first—the first one I received in '44, I evidently have misplaced one——

Q. That would be for '44 operations?

A. For '44 operations. I received two following '43's fiscal year, and two for '44; but [57] this would be the first one of the year. Them two I know come together.

Q. Now, this says: "20% of dollar value $7217.99

(Testimony of C. R. Monaghan.)

x 20%." Do you know, does that $7217 refer to an amount you had already received?

A. Yes, sir.

Q. During the year?

A. During the fiscal year.

Q. Whatever year it was? A. Uh-huh.

The Court: It was not '45, though, was it?

The Witness: No.

Mr. Grigsby: That was either '44 or '43?

A. '44 or '43.

Q. Then, this slip was paid to you the following year of the operations? A. Yes, sir.

Q. The bimonthly payments that you would receive, would they amount to anywhere near those figures when you were paid twice a month as you deliver milk? Do they aggregate any such sum as $1414 every two weeks?

The Court: What was the answer?

The Witness: I said no.

Mr. Grigsby: Well, what I am getting at is, could you possibly have received a bimonthly payment of as large an amount as that?

A. I didn't at that time, I don't think, get that much.

Q. Well, you work 12 months a year, don't you?

A. Yes.

Q. Now, during the fiscal year when you are selling milk, what's the most you ever get every two weeks as an advance?

A. At that time I should judge I probably—my peak would be, maybe, [58] $600.00.

(Testimony of C. R. Monaghan.)

The Court: How much?

The Witness: $600.00, probably around——

The Court: Maybe if you will step back, Mr. Grigsby, the witness will speak louder. I have difficulty in hearing him.

Mr. Grigsby: Excuse me, your Honor. And you know this is for either '43 or '44? A. Yes.

Q. You may hand it to the Court.

The Court: Do you know whether it is for '43 or '44?

The Witness: I wouldn't swear to which one it was until I checked against their books to correspond with it, but I do know that them two you marked '43 were received for the same year's operation.

The Court: All right.

Mr. Grigsby: I think that's all, at this time at least.

Cross-Examination

By Mr. Davis:

Q. Mr. Monaghan, you are the plaintiff in this action, aren't you? A. Yes, sir.

Q. And the various parties testified to by Mr. McAllister yesterday have assigned their claims to you for the purpose of this suit? A. Yes, sir.

Q. And was Mr. McAllister correct when he said this assignment had been made for the purpose of collections? A. Yes, sir.

Q. As a matter of fact, each of the dairymen

(Testimony of C. R. Monaghan.)

still have their [59] proportionate interest in this suit? A. Yes, sir.

Q. And the assignment was made for a matter of convenience to have one party bring the suit instead of 22? A. Yes, sir.

Q. Now, I don't believe you testified directly yesterday as to whether Mr. Thuma did or did not sign the assignment?

A. How was that question?

Q. Did Mr. Thuma sign the assignment—Tuma or Thuma? A. Thuma.

Q. Thuma—did he sign the assignment?

A. He did not.

Q. But according to your testimony he did say that he wanted to come in on this suit?

A. Yes, sir.

Q. Have you been able to find that asignment yet?

A. I left that assignment with Mr. Grigsby.

Q. And, of course, you don't know where it is since that time? A. No, sir.

Q. Mr. Monaghan, how much, if you know, how much money did you get for your milk operations in 1945—in fiscal '45?

A. I couldn't say offhand.

Q. Would the figure $7716.83 — $7716.83 — be right? A. I don't believe so.

Q. Do you have any way of determining how much money you did get for that year?

A. Yes, I have the figures at home, but I didn't bring them with me.

(Testimony of C. R. Monaghan.)

Q. You don't have them here? A. No.

Q. Now, the figure I have just quoted is the figure that the [60] co-op books show you received in money for '45. A. Yes, sir.

Q. Now, there also were some slight deductions: $2.05 for merchandise deduction and $157.08 for the two percent. All those figures added together should be the figures the judge has on the sheet that he has which would amount to around 78 or 79 hundred dollars——

The Court: $7852.34 is the figure listed here.

The Witness: That should be correct, then; I just didn't remember exactly.

Mr. Davis: All right. You don't have any independent memory as to what money you did get that year? A. No.

Q. You are willing to take the books of the co-op then? A. Absolutely.

Mr. Davis: And I think it has been testified that the sheet you have, your Honor, was made from the co-op books.

The Court: Yes.

Mr. Davis: Now, Mr. Monaghan, you started delivering milk, I think you said, about 1942?

A. In the spring—in April, I believe it was—1942, as I remember now.

Q. Do you know anything at all about what was done in connection with milk prior to 1942?

A. No, I was running a bottle route of my own at that time.

(Testimony of C. R. Monaghan.)

Q. Now, you also are a produce producer, aren't you?

A. Very little—a few potatoes occasionally, but very little; nothing else.

Q. Well, you have had some potatoes every year, haven't you? [61]

A. I sold 1300 pounds in '46, I believe it was.

Q. I'm sorry, I didn't get that?

A. I sold a few in 1946. I don't remember as I sold any in '45. I wouldn't be positive of that.

Q. You don't remember of that?

A. Very few, anyway.

Q. Now, I think in answer to a question put by Mr. Grigsby you testified that you have been paid, as Mr. McAllister says he has been paid, twice a month? A. Yes, sir.

Q. On the basis of a definite fixed amount per hundred pounds?

A. Was—our advance was fixed.

Q. All right, I am not going to argue whether it was an advance or payment. Anyway, you have received money every two weeks based on particular price for a hundred pounds of milk?

A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. According to the grade and according to test? A. Yes.

Mr. Grigsby: If your Honor please, I would like to caution the witness he doesn't have to say "yes" to every leading question. It is designed to deceive

(Testimony of C. R. Monaghan.)

the Court and have the record portray what isn't the fact.

The Court: Well, I think the witness——

Mr. Grigsby: I don't see the necessity for any trick question.

The Court: Well, I think the witness can take care of himself.

Mr. Davis: Now, your Honor, I don't think I am trying to trick anybody. Mr. Grigsby puts words in their mouth to say it [62] was an advance. I don't. I want to know what was done.

Mr. Grigsby: Now, the slips furnished by the co-op have the word "advance." I didn't create the word. It is there.

The Court: Well, counsel can argue it some other time.

Mr. Davis: Yes, I will be happy to.

The Court: You may proceed, Mr. Davis.

Mr. Davis: But you have been paid, or advanced as the case may be—you have received money every two weeks on this schedule? A. Yes, sir.

Q. And did you likewise receive a winter bonus during the winters of so much a hundred pounds?

A. Yes.

Q. Fact of the matter is, that has been general—the same system is set up for all the milk producers, isn't it? A. Yes.

Q. Now, I asked Mr. McAllister yesterday as to the mechanics of getting this so-called advance and he testified the thing was automatic: every two weeks you got your check for the milk that had been de-

(Testimony of C. R. Monaghan.)

livered the previous two weeks; you got it by picking it up at the creamery. Is the same thing true as to your milk? A. Yes, sir.

Q. Now, Mr. Monaghan, will you tell the Court how you arrive at the figure that you are entitled to, $3285.04, in this?

A. Through precedent as much as anything else. Something has been handled that way all the way along and were given to understand we were to receive that.

Q. I understand; you testified to that yesterday. But I [63] want to know how you arrived at that figure. What figures did you use and how did you get to that point?

A. We took their annual report.

Q. Well now, you are the plaintiff in this case, aren't you? A. Yes, sir.

Q. All of these figures have been prepared under your direction? I am talking now about the figures for the different claims, Mr. Monaghan. Of course, I know the basic figures come from the co-op, but I want to know and I want you to tell the Court how the various amounts that the men claim have been arrived at.

Mr. Grigsby: If you know——

The Witness: I didn't know what my actual share would be.

Mr. Davis: Well, do you know how these figures were prepared?

A. I don't know that I understand just what you mean.

(Testimony of C. R. Monaghan.)

Q. Do you know, Mr. Monaghan, what figures were used and how you arrived at the end figure, $3285.04, as being the amount you claim to be due to you?

A. I figured, prorated on the amount of milk I sold, on an equal share.

Q. Yes, now, prorated against what? Mr. Monaghan, these slips you have shown the Court show that you were paid a certain percentage, I believe you testified, of the money you had already received that year. Now, is that the way you arrived at these figures, for the year 1945?

A. It would be on that basis, yes. Whatever is the share of the profit from the creamery prorated would be my share.

Q. All right, I think maybe you are getting somewhere now. On the profit of the creamery prorated according to some share?

Mr. Grigsby: Mr. Davis, I might save you time to say I made the computations and he don't know anything of how I made it.

Mr. Davis: I suspected that was the case.

Mr. Grigsby: Why don't you be frank with the witness?

Mr. Davis: All he has to do is tell me he don't know.

Mr. Grigsby: Well, he can't answer your question how he arrived at these definite——

The Court: Counsel should not argue now.

Mr. Grigsby: I object to this snide cross-examination.

(Testimony of C. R. Monaghan.)

The Court: Objection is overruled.

Mr. Grigsby: There isn't a jury here.

The Court: Objection is overruled.

Mr. Grigsby: No use pettifogging a case through before the Court.

Mr. Davis: Mr. Monaghan, do you or don't you know how you arrived at the figure $3285.04 as being the money due to you? A. No, sir.

Q. And do you know how the figures for the other plaintiffs who have assigned their claims to you were arrived at? A. No, sir.

Q. All right. I think you testified yesterday that the bulk of the milk which was delivered by the farmers is sold to—is sold as bottled milk. Will you tell he how you arrived at that [65] conclusion?

A. From the co-op's report.

Q. About when did they make such a report, Mr. Monaghan?

A. We get them often. It was verbal reports.

Q. You actually don't know of your own knowledge as to how much of the milk is sold in bulk and how much as manufactured product, do you?

A. Not exact amount, no.

Q. Well, I mean a proportion: Do you know of your own knowledge that a large proportion—almost all of the milk—goes into bulk milk, as you testified yesterday? Do you know that of your own knowledge? A. Into bulk milk?

Q. Yes, into——

Mr. Grigsby: You mean, sold in town in bottles, don't you?

(Testimony of C. R. Monaghan.)

Q. (By Mr. Davis): In town and to the Army, yes.

A. Yes, I know a large part is sold in bottles.

Q. How do you know that?

Mr. Grigsby: Common sense.

The Witness: I just know it.

Q. (By Mr. Davis): I'm sorry, I didn't hear?

A. I just know it, I say.

Q. Have you had anything to do with delivering this milk after you deliver it to the co-op?

A. No, sir.

Q. Then you don't know of your own knowledge, Mr. Monaghan, as to how much of this milk goes to any particular place, do you? A. Yes, sir.

Q. Well, how do you know it?

A. From reports. [66]

Mr. Grigsby: A little louder, please.

The Witness: From reports from the co-op.

Q. (By Mr. Davis:) All right, I asked that a while ago. Where and when were those reports—such reports—made, and what was the nature of the reports?

A. Made them in our meetings, of course—our annual meetings.

Q. Now, you have annual meetings of the co-op, don't you? A. Yes, sir.

Q. And at those meetings the co-op affairs are pretty well explained to anybody interested, isn't that correct? A. Yes, sir.

Q. And these various financial statements we

(Testimony of C. R. Monaghan.)

have been talking about here are produced and gone over at those meetings? A. Yes, sir.

Q. And you have attended those annual meetings? A. Yes, sir.

Q. Any special meeting they have had, you have attended most of those, I suppose?

A. I didn't catch that last question.

Q. The special meetings of the stockholders, you have attended those from time to time?

A. Yes, sir.

Q. And you also have met with the Board of Directors from time to time about this milk problem, haven't you?

A. I don't know as I ever met in a regular board meeting in regards to it.

Q. You haven't ever been a member of the Board of Directors, have you, of the co-op?

A. Yes, sir, for a short time this winter.

Q. How long a time?

A. I believe I was sworn in on the seventh of December and I served until the annual election.

Q. That would be the seventh of December, 1946?

A. Yes, sir.

Q. And you served until the annual election, which was in January, '47?

A. No, it was in the latter part of February, I believe it was.

Q. All right, I don't want to put the date in your mouth. All right, then, you served about two months on the Board? A. Approximately.

(Testimony of C. R. Monaghan.)

Q. Now, did you hear me read to Mr. McAllister yesterday certain minutes of the Board of Directors meeting in which you had some discussion? Did you hear that? A. I don't remember that, no.

Q. Do you remember attending a meeting of the Board of Directors at which a discussion was had of the milk dealers' problems and you did some discussing at that meeting? I believe that was in 1943.

A. I don't remember, no. I don't remember what you are referring to.

Q. Don't remember whether you were there or not? Now, do you have any knowledge, Mr. Monaghan, as to the percentage of profit—so-called profit—surplus, maybe we would call it—of the dairy department that arises from the sale of bulk milk and the percentage that arises from manufactured products?

Mr. Grigsby: Objected to as immaterial.

The Court: Overruled. You may answer, if you know.

The Witness: Ask that question again, please.

Q. (By Mr. Davis): I asked you, Mr. Monaghan, if you know of your [68] own knowledge, anything about the percentage of profits that arise from the operation of the part of the plant they call the dairy and from the part of the plant that they call the creamery, in other words, the manufactured products and the bulk milk products?

A. Why, I know what they are supposed to receive for the bottle of milk. I don't know what they pay for it. I couldn't——

(Testimony of C. R. Monaghan.)

A. I said, I know what they receive for the bottled milk.

Q. Who? What who receives?

A. The co-op receives for the bottled milk.

Q. And how much is that? A. 35c a quart.

Q. And that has been raised from 30c within the last three or four months, something like that?

A. Since the first of September, I believe it was.

Q. Yes, five months?

A. It was 30c previous to that.

Q. That is how much?

A. It was 30c previous to that.

Q. Do you know how much is received from the milk they sell the Army?

A. No, I couldn't quote prices on that.

Q. Now, Mr. Monaghan, these so-called profits include the proceeds from both the manufactured products and the bulk milk sale, don't they? Now, if you don't know, say so; if you do know, I want your answer. A. No, I don't——

Q. They do not? Your answer is that the so-called profits do not include the proceeds of both the creamery and the dairy? [69]

A. I don't understand that — the way that is handled—exactly.

Q. Well, I will try to be more explicit. Yesterday these was a figure thrown around here of $57,000 as the so-called profits of the dairy department. Now, what I want to know is if you know as to whether or not that figure includes profits from the bulk sales of milk—the sales in bottles—and the

(Testimony of C. R. Monaghan.)

profits of the creamery department—the popcicles, the cottage cheese, the ice cream, the other manufactured products—as well?

A. Well, my understanding on that is that there is a certain percent in there. The way they have explained to us—the co-op explained to us—they failed to keep their books; they can't tell us what percent.

Q. All right, and then to answer my question: Do you have any knowledge what percent?

A. No, sir.

Q. And you don't have any knowledge because they failed to keep their books so they can't tell you so you can't tell me? A. Yes, sir.

Q. Now, I think you were present at an informal meeting of four of the Board of Directors about a year ago—maybe a little over—maybe not quite a year ago—in which a discusion was had about the 1945 milk. Do you remember being there at that time? A. I was.

Q. Will you tell the Court what the discusion was at that time?

A. Well, it was—tried to figure out some settlement with the co-op Board that were present, but they didn't know legally [70] what they could do, and it was suggested that they bring it before the Court, as has been done.

Q. Who were present there beside the four members of the Board of Directors?

A. I couldn't give you a list. I don't know.

(Testimony of C. R. Monaghan.)

There was quite a number there, but I couldn't name you——

Q. Could you tell me some of them?

A. Well—oh, Mr. McAllister and myself, and I don't know, quite a number.

Q. What—I am sorry?

A. I say, there was quite a number other dairymen there, but I don't remember.

Q. Would that be the committee from that dairymen's group that Mr. McAllister was talking about yesterday?

A. We didn't really have a dairymen's association. In fact, that's what started a dairymen's association at that time. We just called a group of dairymen together to meet with the Board.

Q. Was anything said at that time about all the milk dealers demanding $57,000 from the co-op?

A. I don't know whether you would call it demanding. We argued we should have it, that we was entitled to it.

Q. Was the figure $57,000 mentioned?

A. Yes, sir.

The Court: Pardon me, counsellor. I don't remember any testimony about $57,000. There was testimony about 53,000 and some hundreds of dollars.

Mr. Davis: I think, your Honor, the figure is $57,001 and some odd cents.

The Court: Oh, that is including the income from rents. [71]

(Testimony of C. R. Monaghan.)

Mr. Davis: Yes, and if I understood Mr. Monaghan's testimony yesterday on direct examination he said he was present at the time a demand was made for the $57,000. Now, I may be mistaken, but that is——

The Court: Yes, $57,001.58. I had overlooked that. You may proceed. Maybe you had better ask the question again or have it read.

Q. (By Mr. Davis): Now, Mr. Monaghan, I want to know if you demanded—if demand was made of the co-op Board, that you be paid—by you I mean all the dairymen—be paid $57,000?

A. You might call it demand.

Q. Well, the fact of the matter is, it was more or less a friendly discussion, wasn't it, to find out what could be done? A. Yes, sir.

Q. And you sat down with the Board and you said: "We feel we have got some money coming. This shows a profit for the dairymen." And then the members of the Board said what you have previously testified here, that "we don't know whether we can legally do it or not, and we don't know whether we can pay it or not if we could legally do it, but we would like to see you get some money," something on that order. Wasn't that about what happened in that?

A. They didn't say "some money." They said we was morally entitled to it, but they didn't know whether legally they could pay it or not.

Q. And at that time, it was suggested the mat-

(Testimony of C. R. Monaghan)

ter might be [72] brought before the Court and settled? A. Yes, sir.

Q. And following that this suit was filed?

A. Yes, sir.

Q. Now, I am not clear on the matter of these slips. Mr. McAllister testified these slips, similar to the ones you have presented here, came at the time that the extra money was paid after the end of the year. Is that also your testimony?—These slips that have been presented here as Exhibit 5?

A. These slips were issued after the audit, and when they got their preliminary figures from the auditor the first time that they paid the 20%—see, that would be the spring of '44 — they says we haven't the final audit, but we do know that we can safely make a part payment on it. If the farmers needed money to operate in the spring, they said, we can pay 20% safely, we know, now and they did so. Then after the—they got the books back from the auditor—he had gone back to Juneau and took the books back there—when they got their final figures and everything was all paid off—everything —all the deductions and everything—we got the balance from the second payment.

Q. And those figures are based on a percentage of the milk—a percentage of the payment amount you had previously been paid for milk that year?

A. Yes, sir.

Q. Mr. Monaghan, just for the information of the Court, these audits have always been made by

(Testimony of C. R. Monaghan)
an outside firm, haven't they. They are not made by the co-op accountants?

A. Yes, an outside firm. [73]

Q. The particular years under consideration, I believe, they were made by a man from Fairbanks —a firm from Fairbanks?

A. Mr. Neill, I believe—Neill and Clark.

Mr. Davis: Excuse me a minute, your Honor, please? That's all, Mr. Monaghan.

Mr. Grigsby: That's all, Mr. Monaghan.

The Court: That is all, Mr. Monaghan. Another witness may be called.

Mr. Grigsby: Mr. Allyn, will you take the stand, please?

MARVIN ALLYN

being first duly sworn, testified for and in behalf of the plaintiff as follows:

Direct Examination

By Mr. Grigsby:

Q. Mr. Allyn, I will hand you a document—well, first, what is your position with reference to the Matanuska Valley Farmers Cooperating Association?

The Court: Let us get his name first.

Mr. Grigsby: What is your name?

A. Marvin Allyn.

Q. Have you a position in the defendant corporation? A. It is——

(Testimony of Marvin Allyn.)

Q. What?

A. Chief Accountant and, more recently, assistant general manager.

Q. And how long have you been an accountant for the defendant?

A. Since the 15th of January of this year. [74]

Q. Now, can you tell the Court what this document is?

A. That is a copy of the annual audit for the fiscal year 1945 and prepared by Neill, Clark and Company, Public Accountants.

Q. And who made this copy?

A. The accounting firm in their offices.

Q. That was made when?

A. It will be dated on the cover sheet: It is dated February 11, 1946.

Q. Is that part of the records of the defendant corporation? A. It is.

Q. Have you examined this—you had nothing to do with the preparation of this?

A. None whatever.

Q. Have you examined it so that you understand the data given here in this compilation?

A. I understand the result as presented there and the certificate of the auditor.

Q. Well, do you understand how the results were arrived at—the computations?

A. Not fully. In other words, the records were prepared and examined—audited—to the satisfaction of the public accountant who expresses in his

(Testimony of Marvin Allyn.)

certificate his satisfaction that they are accurate and correct.

Q. I wasn't asking you about their being true and correct. I don't doubt that. But I ask you if you have made examination of this audit so that you understand the system on which it was made? And can explain them? A. I believe so.

Q. And have you examined—have you ever examined that contract that is in evidence?

A. Not minutely. [75]

Q. Well, you have discussed this case, haven't you—this controversy—with the Board of Directors and with Mr. Davis? A. Yes.

Q. And you understand what this law suit is about? A. Yes.

Q. Have you read this paragraph (7) of the contract which is in evidence, Mr. Allyn, which provides for the terms of payment for products—agricultural products—sold to the co-op, and which states that, with reference to the terms of payments, certain deductions will be made as follows:

> "(a) repayment of advances made to Producer under Paragraph 4 of this Contract and interest on said advances; (b) reasonable charges for the services of receiving, handling and selling said agricultural products under Paragraph 5 of this Contract;"

Now, can you, in this audit, point out where that charge is made—reasonable charges for the receiv-

(Testimony of Marvin Allyn.)

ing, handling and selling? Are you familiar with this enough so you can find those charges?

A. These charges—the operation of the cooperative organization—you must maintain your office, your entire organization, your depreciation, your financial reserves—it requires the entire unit—and the expenses of the Association, and they are taken in your profit and loss statement for the Association. Your indirect—your operating expenses cover all products.

Q. Yes, Mr. Allyn; my question wasn't that. My question was whether you can turn to the page there where the charge for [76] handling, receiving, re-selling the products is set forth—that separate charge?

A. No. They are handled as a cooperative organization.

Q. Well but, there is a place in the book there where the expense of handling is set forth, isn't there?

A. No. You have your—for instance, a delivery expense; you have got depreciation; you have got gas and oil; you have got maintenance and all your other expenses are a part of the cost of handling.

Q. Is that set forth anywhere in this book?

A. Oh yes.

Q. Well, that's what I want.

A. (Leafing through book) Schedules 8 and 9, your Honor—it is shown on Schedule 8 and Schedule 9. It must be taken as a combination of both.

Q. Well, Schedule 8: Now, on Schedule 8 in the column headed "Dairy and Creamery" there is

(Testimony of Marvin Allyn.)

a total of $83,807.54. What does that figure represent?

A. That represents the proportion of the expenses of the total Association as it was estimated to be the percentage applicable to the dairy unit as such.

Q. Now, Mr. Allyn, do you mean to tell the Court that that figure $83,000 is arrived at by taking a percentage of something?

A. Those are that portion of the expenses which they felt justified in attributing directly to the department.

Q. To the dairy unit?

A. To the dairy unit.

Q. For instance, they charged the dairy unit with $552.90 for advertising. A. Yes.

Q. Well, wasn't that a direct expense? Not that they felt [77] justified, but wasn't that actually incurred as an expense of advertising for the dairy and creamery unit? It wasn't a proportion of anything, was it?

A. I think so. My understanding is that they pay, for instance, for radio broadcasting, they paid —the monthly statement for the broadcasting company, for the newspaper advertising——

Q. For the advertising of what?

A. Of the products of the Association of which they felt that the—perhaps the dairy products received the benefits of two-thirds of the advertising, or whatever the proportion might be.

Q. What do you mean, now, by that? Explain that a little.

(Testimony of Marvin Allyn.)

Q. All right. Now, there is an item here of "Supplies," $25,752.07, which goes to make up that total of $83,807. Do you know anything about that item—what that consisted of? What supplies?

A. In those years, no.

Q. Well, in this year—'45? This is for one year, this item here.

A. That would include sterilization equipment; it would include the small tools that might have been used.

Q. But we have an item of small tools of $184.

A. All right. In that year they made a separation. In the '46 audit you will find that the small tools would be a part of your supplies.

Q. Well, what else did that $25,000 include?

A. It would include, perhaps, cans, metal sponges; it would include all miscellaneous supplies necessary to operate the dairy and which did not become necessarily a part of the finished product.

Q. Well, would it include the purchase of powdered milk? [78]

A. That would have to be determined from an examination of those particular accounts.

Q. Is that accessible?

A. Here, no. That is part of the records up——

Q. Part of the records? Could you tell from your record what that $25,752 is?

A. With a great amount of work, yes.

Q. Now, there is an item here of "Salaries and Wages," $32,869. That's the salaries and wages incurred in running that particular unit?

(Testimony of Marvin Allyn.)

A. I would say so, yes.

Q. And "Lights, Power and Heat," $3627.39, that's incurred in operating that particular unit?

A. My understanding is that that would be merely the heat, power and light for the Anchorage Dairy and that the heat, power and light for the creamery in Palmer would be under this next schedule of indirect prorated on the base of sales.

Q. You don't think this item includes any of the power down there at Palmer?

A. I don't believe so. There again, this is an opinion. I wasn't in on the preparation of these records.

The Court: Court will stand in recss until 11:15.

(Whereupon recess was had at 11:05 o'clock a.m.)

After Recess

Mr. Grigsby: What was the last question?

(Reporter read last question and answer.)

Q. Mr. Allyn, have you accessible here in the court room, the figures showing the amount of money paid all the dairymen [79] for milk for the year 1945? A. Yes.

Q. Could you get it, please?

(Witness left stand.)

The Court: Isn't that figure shown in the audit?

The Witness: $136,143.47.

Mr. Grigsby: That corresponds with the figure I have. A. It does.

(Testimony of Marvin Allyn.)

Court: Will you read that again?

Mr. Grigsby: $136,143.47.

The Court: That is the total derived from the sale of milk?

Mr. Grigsby: No, your Honor, that is the actual cash paid the dairymen for their product of 1945.

Did you prepare that sheet, referring to Plaintiff's Exhibit 3?

A. Yes. This is one of several schedules which I prepared for the plaintiff.

Q. You took that off—that's all in the book right there?

A. It's all in the book. Those were made as information returns and any differences that may develop, the books will control.

Q. Do you know what page of the book that's from?

A. It may come from several. I would have to examine them both.

Q. Well, on Page 9?

A. If you will bring them here I can help you on that. The statements were not to my knowledge prepared as evidence. They were prepared as information.

Q. Yes, I understand that. I asked you—you can look at it right here—that is taken from Pages 17—that's that figure?

A. Yes, it is a condensation. [80]

Q. 17, 18—— A. It is.

Q. And 19? A. It is.

(Testimony of Marvin Allyn.)

The Court: Are you talking about the audit now—Plaintiff's Exhibit 4?

Mr. Grigsby: Yes, if your Honor will refer to Page 17, 18 and 19.

Court: Yes, I have looked at them, but I will admit that I do not know every figure on them.

Mr. Grigsby: Page 17. Now, on Page 17 you have an item "Cost of Goods Sold," Dairy and Creamery, $178,422.88. That listed on this statement, and it's Page 17, your Honor.

The Court: I have it.

Q. (By Mr. Grigsby): Now, that is the cost of all dairy products sold, isn't it, regardless of whether they were bought from the dairy farmers or purchased elsewhere?

A. Yes, that should be the cost at the point of sale.

Q. Now, $178,422.88—of that, you have testified, $136,143.47—that doesn't appear in the books—was paid to the dairy farmers for their milk?

A. That would be right.

Q. Now, to whom was the rest paid? That leaves a balance of something over $542,000. I will call your attention to the fiures of "paid to the dairymen"—178,000 is the cost of the goods sold.

A. That should include all such supplies as become a part of the finished products.

Q. Would that include, probably, milk, then?

A. That should [81] include powdered milk.

Q. Well, can it include anything that didn't go

(Testimony of Marvin Allyn.)

into the finished product? Would it include the expense of finishing the product?

A. I am not prepared to answer that. That would be a bookkeeping procedure for that particular period.

Q. Well, do you know whether the book shows what that other $42,000 was paid for?

A. Oh, of course.

Q. They are not here, though? A. No.

Q. Well, could you get it—that information?

A. It could be developed, certainly.

Q. Sir? A. Certainly, it could.

Q. Excuse me a minute, your Honor. I have deducted $136,143.47 from the total cost of goods—dairy products—sold, which would be the purchase price of them, or the purchase amount paid. That leaves $42,279.41. Now, could you ascertain from an examination of the books when you go back tonight what that $42,279 includes?

A. That information should be in the records of the cooperative.

Q. And it is accessible, is it?

A. Not readily, but it is there.

Q. Well, would you be able to bring it here tomorrow? A. Oh, certainly.

Q. I will just hand you that as a notation of it. Now, do you know whether or not——

A. Did you understand I said this will not be available by tomorrow? [82]

Q. It won't?

(Testimony of Marvin Allyn.)

A. It would be a complete re-check of the whole accounting procedure for a year.

Q. Well, do you know offhand—

A. It will take a re-audit of those expenses.

Q. Well, on Page 21 where I called your attention to the figures $83,807, which represents the operating expenses of the dairy unit for the year '45, would that $42,000, to your knowledge, include any of the items that go to make up that $83,000 — for instance, "Supplies," $25,000?

A. Yes.

Q. Would that?

A. Be included in the cost of goods sold?

Q. Would that include any of that?

A. No, the 42—

Q. The 42,000 — the balance. The 136,000 was clearly paid for milk. 42,000 was paid for something else. Now, you said it would include anything that went into the finished product — perhaps the expense of putting it into the finished product.

A. Well, if you are driving at——

Q. I am not driving at anything. I just want to know if it includes anything that is included in that operating expense?

A. In the cost of goods sold? It should not.

Q. How about it including the cost of the goods sold at the dairy which consisted of powdered milk mixed with the finished product? Would it include that? I am trying to get at the question whether any part of the operating expense of the unit—the dairy unit — is comprised by that $42,000?

(Testimony of Marvin Allyn.)

A. I can only answer that by saying that it — this statement and the separation — the allocation of all these expenses — were done in such a manner as to be approved by the public accountant who prepared these figures—

Q. Now, I didn't question that fact. Now, you needn't mind that at all. I am trying to get at this: Supplies, $25,752 — could you get that information with about the same amount of difficulty as you could get the information what the 42,000 went for? It would be about as hard a job, wouldn't it? A. It would be.

Q. And supplies purchased under the head of operating expenses of the dairy and creamery for 1945?

A. Did you ask me a question on that?

Q. No, I didn't. If you do account for where that $42,000 went, that will answer my other question and I will ask you to produce it as soon as possible, and tomorrow morning if possible.

A. Well, that would be out of the question. It would be a re-examination of the accounts—it would be detailed audit for the whole year. It took this man, I estimate, two months to prepare these statements and examine these records and you are asking that I make even a further breakdown than this man did.

Q. Of one item.

A. Well, I have got to find out—everything has got to tie together. You can't pick out any one. Any figure on any of these statements is tied to

(Testimony of Marvin Allyn.)

and derived from or in conjunction with every other figure.

The Court: May I ask a question there? In your general books [84] would there be a separate account under the head of supplies which would give you the information desired here as to the items of the $24,752 very quickly? Have you got any such heading in any of your books marked "Supplies?"

The Witness: During those years I would have to go back and see.

The Court: You may find it on one or two pages?

The Witness: But that still wouldn't answer his question. We would have to go back to the original invoices and vouchers.

The Court: I do not know whether counsel would want to go back and examine the original invoices and vouchers. Perhaps the book or page would show the various items of supplies included in this.

The Witness: It won't by name. It would be by amount and reference to the vouchers.

Mr. Grigsby: Would it show the article?

A. No, you would go back to the original voucher and invoice which are, of course, in the warehouse in the archives.

Q. Well now, Mr. Allyn, this statement: Have you got that exhibit there?

The Court: I have this one — I have the copy of the audit.

Mr. Grigsby: No, the one I just had in my hand.

(Testimony of Marvin Allyn.)

Now, here is the item of $178,422.88, which consists of $136,000 paid to the milk farmers and the figures I gave you of $42,000 paid somewhere else. Now, I will state that in 20 minutes the bookkeeper down there was able to give me the figure on what was paid [85] to the milk farmers. Now, why couldn't the figure paid for powdered milk for the year 1945 be given just as quickly?

A. Because that amount is — record is kept for each individual farmer. The individual farmer isn't interested in how many pounds of, or ounces of powdered milk were used in a certain day or a certain month, but he is interested in knowing how much milk he delivers and what he got for it.

Q. But you kept a record of what you paid the farmer for raw milk? A. Right.

Q. And you kept a record of what you paid somebody else for powdered milk for the year '45? That's down there? A. On an invoice.

Q. Well now, is it going to take days and days to find out how much powdered milk you bought in 1945?

A. If you want to know just powdered milk, no.

Q. Well then, I want you to get that.

A. All right.

Q. Now, what other—

Mr. Davis: You Honor, might I ask a question here to see if we could clear this up a little?

The Court: Go ahead.

Mr. Davis: I am wondering, Mr. Grigsby, if you are interested in finding out how much powdered

(Testimony of Marvin Allyn.)

milk was bought in that year, or are you interested in what items went in the $43,000?

Mr. Grigsby: I am interested, I will state to Mr. Davis, in finding out whether the operation expense of the dairy unit [86] included the purchase of any supplies. Now, it included $42,000 that went for something.

Mr. Davis: All right, I think he answered that when he began here. He said that the $42,000 included supplies which went into the manufactured product.

Mr. Grigsby: That is his opinion. All right, I want to know how much?

A. It would also include packaging—

The Court: Also include what?

The Witness: Packaging material — your ice cream cartons, your milk bottle caps, your egg cartons, the seals on an egg carton; it would include your sugar; it would include your flavorings; it would include all the other ingredients of your ice cream,——

Mr. Grigsby: Is that the——

A. Of your mix.

Q. What other finished product do you make down there besides ice cream?

A. Ice cream, ice cream mix — during those years they made chocolate milk.

Q. We are talking about one year—'45.

A. During that year—I have a list of and the amounts, the sale values here of the different prod-

(Testimony of Marvin Allyn.)

ucts that were manufactured and sold by that department during that year.

Q. I am very glad to hear that. Now, you have stated certain ingredients that would include. Now, can you state whether that item, $25,752, charged to supplies, includes those items?

A. It should not. [87]

Q. But you don't know positively whether it did or not?

A. I didn't keep the records, no.

Q. When I asked you what it did include you mentioned tools, but tools is segregated as $184.

A. Yes. Well, I thought perhaps it might be. I see they have broken it down into supplies.

Q. Now, can you state what that $25,000 does include?

A. It would include supplies used in the operation — mechanical operation, of the department.

Q. Well now, for instance, what supply? Fuel?

A. That should be in your fuel cost, I believe.

Q. Then what supply? It isn't the fuel cost?

A. All your cleaning materials, that would be a big item—your sterilization. I would include any testing and standardizing supplies, other chemicals that might be used for the same purposes.

Q. Would those total $25,000 for one year?

A. Obviously they did.

Q. Well, if they include it, but you don't know what they would cost. Now, they don't include gas, oil and grease? A. No.

(Testimony of Marvin Allyn.)

Q. And no doubt that gas, oil and grease was purchased? A. That's right. That——

Q. Do you know anybody here that you have talked with that does know what that includes?

A. I don't quite understand this. We have got —the accounting—these were set up and accepted to the best of the accounting——

Q. I know, and I want to find out what they include. I want [88] to know what this item of $25,000 is, and I want to know where that $42,000 went to, and—

A. It should have gone to all of these other expenses: For sugar, for milk powder, for salt, for powdered eggs, for ice cream, or what — all of the other ingredients of the ice cream, for the materials for packaging the equipment, those products.

Q. But you don't think those come under the head of "Supplies" in this statement?

A. No, they do not.

Q. Do you know positively they do not?

A. I do not positively know; I didn't keep the record.

Q. Well, it can be ascertained, can't it, ultimately?

A. Ultimately, by a re-audit of the accounting work of that year.

Q. A re-audit of that particular part of the accounting? A. All right.

Q. Now, I want to know, Mr. Allyn, what this $25,752.07 included and I want to know where the $42,000 figure you have, where that money went,

(Testimony of Marvin Allyn.)

as soon as you can get it. Now, Mr. Allyn, this $83,807.54, is set down here under the head of operating expenses. That means the operating expenses of the dairy unit for '45. Now, that includes the handling and re-sale of milk, necessarily, doesn't it? A. Oh yes.

Q. It includes all the items which are set forth as deduction (b), receiving, handling, selling milk sold to the defendant by the dairymen — it includes that?

A. Re-state that, please.

Q. The item, $83,807.54 includes the expense of receiving, [89] handling and selling the milk produced by the dairymen, sold to the co-op, in 1945?

A. And all other products handled by that department.

Q. Yes, the handling of all other——

A. And the — yes — and also the operating expenses included in the manufacture of those other products.

Q. Yes, all the expense of disposing of the product of the dairymen and of the other product that went into any processed article. It includes all that expense, doesn't it?

A. Now, when we say "all that expense" we are leaving out the general expenses of operating the entire Association.

Q. Of course, I am leaving all that out, of course.

A. Then you are getting me to say all of the

(Testimony of Marvin Allyn.)

expenses of these particular products — I don't want to be misunderstood.

Q. Well, all right, it includes all the expenses connected with the handling, receiving and sale of the milk delivered by the dairymen—it includes that, doesn't it?

A. That was allocated by the bookkeeper at that time as being chargeable direct to — in other words, of this amount there was absolutely no question, that went directly there.

Q. Yes, and it includes all other expenses connected with the dairy, and operations of every kind, and that's all it does include—all expense incurred after the purchase of the article? In other words, the milk you delivered down there: Now, all other expense included in handling that milk is included in this $83,000, [90] isn't it?

A. Let me explain that: In the operation of the Association, the Association did not have a cost accounting system. Everything was on a dollar and cent basis during all the past years. In an attempt to find out—they're operating a number of departments, including the produce department. Within the produce department they handle celery, lettuce, cabbage, potatoes—well, now, obviously the detail would be tremendous to take and figure out how much it cost them to handle celery, how much to handle lettuce, how much for rutabagas, how much for turnips, so for convenience they were grouped into departments. These separations were an attempt, without strict detailed cost accounting

(Testimony of Marvin Allyn.)

system, for the purpose of management, to determine where the Association earnings or net deficits came from in the attempt to put everything on an even basis so that every department could come out at the end with neither a profit nor a loss. It is an internal separation—

Q. Now, that doesn't answer my question at all.

The Court: Wait a minute. Let the witness conclude, Mr. Grigsby.

The Witness: It is an internal breakdown for the benefit of the management for the better control and analysis of the income and expenses of the Association. In other words, any of these—we are attacking these reports as if they were a cost accounting system.

The Court: What did you say, attacking?

The Witness: We are tearing these apart; we are questioning them, as whether or not that this allocation of $25,000 is every [91] penny or every dollar that was in a certain place. That's why I can't answer those questions definitely.

Mr. Grigsby: I can understand that you can't, Mr. Allyn, and I have asked you to find out where that $42,000 went. Now, I want to know——

A. Now, you are asking a question on cost accounting by this department that they—

Q. Well, I don't care anything about cost accounting.

A. May I finish, please? That accounting system was not a cost accounting system. It was not designed to give a figure of that nature. That's why I say——and the physical mechanical work involved

(Testimony of Marvin Allyn.)

will be to go back into the warehouse, into the vaults, and find those old vouchers and analyze them to get back to this figure. That isn't a cost accounting figure.

Q. Now, Mr. Allyn, will you please answer my question? You have a sum set down here of $83,-807.54. It is set down as the operating expense of the dairy and creamery for 1945. You have here the operating expense of the meat unit, of the produce unit. Now, all those sums set down here are the direct expense of running those particular units without regard to the miscellaneous indirect overhead in these items. This item of $83,807 is what it cost to run the dairy and creamery unit, isn't it?

A. They—the certified—the public accountant was satisfied and certifies that that was the case.

Q. Well, do you know whether that was the case or not?

A. From personal knowledge, no. I wasn't here. [92]

Q. Does this book purport to set it down as what it cost to run the dairy and creamery unit?

A. Yes.

Q. All right, then, that includes all the cost of receiving, handling and selling of the milk that they bought of the dairymen, doesn't it?

A. Expenses that were directly attributable to that.

Q. Yes, it includes hauling the milk to Palmer, doesn't it, from Palmer to Anchorage?

(Testimony of Marvin Allyn.)

A. Yes.

Q. And it includes pasteurizing it here in Anchorage? A. Yes.

Q. It includes every expense there is connected with the handling of that product? A. No.

Q. Well, what expense connected with the handling of that product does it not include?

A. That product requires a certain percentage of your manager's salary.

Q. But that is charged elsewhere, isn't it?

A. Yes.

Q. Under the head of indirect overhead?

A. Yes; therefore, this isn't all the expenses.

Q. But this is all the direct expense connected with that unit, isn't it? A. All right, yes.

Q. You have got this $32,000 set down here for salaries connected with that unit? A. Yes.

Q. The salaries of the co-op—the manager and all those other departments — is charged — apportioned to the dairy unit elsewhere in these books, isn't it, under the head of indirect overhead?

A. Yes.

Q. Now, what page is that indirect overhead?

A. That is [93] Schedule 9, I believe. It should be the next page from your operating expense.

Q. Schedule 9 — it isn't apportioned?

A. Yes, Schedule 9, on Page 22, is your indirect overhead.

Q. Schedule 9 on Page 22 doesn't give the apportionment to the dairy unit of the indirect overhead?

(Testimony of Marvin Allyn.)

A. That is spread on the basis of sales.

Q. Yes, but it isn't on Page 22 under Schedule 9. There is Page 22, Schedule 9.

A. Well then, let's — that's the totals of all your — here is the way — "Indirect Overhead Prorated," if that's the one you want — it is on Page 19.

Q. Exhibit B—now, on Page 19: Mr. Allyn, the indirect overhead consists of the power house expense, the cabinet shop expense, and the general and administration expenses. That includes the salaries of running the whole enterprise and the general expenses of the whole enterprise? Now, that's apportioned to the different units in proportion of the amount of business each unit did, isn't it? That is total sale? A. That is right.

Q. For instance, there is charged to the dairy unit, $12,220.44 of the power house expense, $9,-521 of the cabinet shop expense and $23,378 of the general expense — that's apportioned? Do you know what percentage of the total expense they are charged with? A. The creamery-dairy?

Q. Yes; something like 33, is it?

A. I don't know; I would have to look it up. (Mr. Grigsby handed book to the witness.) [94] In this report it is not shown in the total. It is in the—the indirect overhead is shown by three breakdowns.

Q. Well, there is a sheet there that shows percentage to— A. I take it that this—

Q. Would it be the percentage that the total re-

(Testimony of Marvin Allyn.)

ceipts for dairy production bear to the total receipts for all sales? A. That is right.

Q. That would be — the total receipts for all sales being $1,091,439.21, and the total receipts for dairy production being $361,145.56, they could be charged with $361,145.56 — that fraction which would result in something over along about 33%, wouldn't it?

A. Well, I can't follow you through that.

Q. Well, suppose their sales amounted to a third of the total sales, then they would be charged with a third? A. Yes, that is right.

Q. It would be on that basis?

A. That is right.

Q. That is just an arbitrary figure they set down as being fair?

A. All the way through in all these separations it was to arrive at the fair and equitable distribution.

Q. Yes, I realize that. All right, now, the indirect overhead is set down in your books and on this statement as all the indirect overhead $128,653.39? Do you remember that as being about the figure?

A. I don't, but if it is on there, it is correct.

Q. $128,000 — that's for '45?

A. Yes, that should be the [95] total of those three columns in the audit report.

Q. And under the head of "Operating Expenses" there is $246,888 total for everything — all the units? A. Uh-huh.

(Testimony of Marvin Allyn.)

Q. Including $83,000 charged for operating expenses for the dairy-creamery? A. Yes.

Q. Now, that's all expense, isn't it?

A. That is all expense.

Q. Of the whole co-op?

A. These two together, yes.

Q. And in arriving at what purports to be the net profit of the dairy, their operating expense, to wit $83,000, and their share of the indirect overhead, $45,121, is deducted?

A. That's '46 you are looking at.

Q. '45.

A. All right, '45. The dairy-creamery's share of the indirect overhead, plus their share of the operating expenses—

Q. No, plus their operating expenses? Plus their actual operating expenses? The operating expenses weren't apportioned on a percentage—?

A. That's while — well, we will agree to that, if it will add up—

The Court: Court will stand in recess until 1:30 this afternoon.

(Whereupon recess was had at 12:00 o'clock noon.)

Afternoon Session

The Court: You may proceed when you are ready.

Mr. Grigsby: May I have that Exhibit No. 3, I think it is?

The Court: I think I have them all here.

(Testimony of Marvin Allyn.)

The Witness: You should find the same figures on the book. [96]

Mr. Grigsby: I know they are taken from here, but for convenience—

Mr. Davis: 17, 18, 19, or something like that are the pages you were asking about this morning.

Mr. Grigsby: Well, I have the figure here, on Page 17, being Exhibit B, Mr. Allyn, under the head of "Cost of Goods Sold," is the item charged to dairy and creamery, $178,422.88, and it has been testified to that 136,000 and some odd dollars was paid to the dairymen for milk, and I left you the balance there to look up of something over 42,000. However, that sum of $178,422.88 includes commodities that went into the product that was sold, whether it was a processed product or raw milk it can't consist of anything except material that was sold. In other words, it don't include anything besides milk, cost of powdered milk and any extracts that went into the ice cream — that's vanilla sugar — it includes stuff that went into food that was sold, is that right?

A. In conversation with members of the Association during those years, and with former general manager, they believe that to the best of their recollection that in your supply figure of $25,000 that there were some other supplies such as sugar and butter and eggs in the supply figure, so that your cost of goods sold there would include not all of the actual cost of the manufactured products. In other words, during the inventories, an inventory

(Testimony of Marvin Allyn.)

of supplies may have contained — they recollect that it contained part of the sugar, for instance. It might [97] have included some of the egg powder. So that you may have some of the costs of the finished product also allocated to the supplies. Now, I don't mean to say that there is any duplication, but—

Q. Do you know that there wasn't any?

A. Absolutely.

Q. How do you know?

A. Because these were audited and checked for exactly that sort of error by the public auditor, and he certifies that to the best of his knowledge and belief, and after spending two months checking these books as an independent auditor, he is willing to certify that these separations are correct and there is no duplication.

Q. Well, is there a certificate attached to this?

A. I think it is your first page. It will be the second or third page.

Q. Now, the final paragraph of the certificate signed by Neill, Clark and Company — not by any agent, but by the words "Neill, Clark and Company:"

"Subject to the comments contained herein, and in conformity with the system of accounting consistently maintained by the Association, we certify that, in our opinion, the accompanying balance sheet and related statement of profit and loss fairly present the financial position of your Association as

(Testimony of Marvin Allyn.)

at November 30, 1948, and the income for the fiscal year so ended, respectively.

"Yours very truly, [98]
"Neill, Clark and Company"

That is the certificate you allude to?

A. That's right.

Q. Now, you say that after talking with some of the gentlemen here, including members of the Board of Directors, they are of the opinion that the item of 24,000 and odd dollars charged to supplies for the dairy department could have included some such things as sugar and any part of the powdered milk? A. It could have, yes.

Q. Eggs?

A. Powdered eggs — not eggs purchased from the farmer.

Q. Not from the farmer? A. Oh no.

Q. But it could have included some part of what went into the finished products?

A. Yes, that is right.

Q. That was mostly ice cream, wasn't it?

A. Finished product?

Q. Of the creamery down there?

A. Ice cream, ice cream milk, are—

Q. Mix? A. Mix—are the largest.

Q. Then this item of $178,000 which is listed as the cost of the goods they sold would also include the cost of powdered milk, wouldn't it?

A. It would include the amount that we used other than which would have been included in the other supplies expense, if any was included.

(Testimony of Marvin Allyn.)

Q. In other words, they have charged a part of the powdered milk to operations under the head of supplies and part of it to the cost of goods sold? A. That might have happened, yes. [99]

Q. And you don't know in what proportions?

A. No.

Q. There is no way of ascertaining that, is there?

A. There is by comparison of the supplies expense of the various years to see if your—

Q. That's the thing that would be so hard to find? A. That is right.

Q. Anyway, this $178,000 listed as "Cost of Goods Sold" can't include anything else except the cost of edibles, can it? It includes $136,000 for milk, and then it includes amounts paid for other commodities which are re-sold, doesn't it?

A. That is the best accounting practice, yes.

Q. What I am getting at is it doesn't include any production expense? It doesn't include anything except what was sold, does it?

A. No. It should include—it should include—under cost accounting it would include the cost of the product at the time it was sold. This not being a cost accounting system is the reason why in the separation that you may have the same item of expense. For instance, you might find that during that year they had ice cream cartons — part of it may have been charged in with the cost of goods sold as part of the finished product, whereas part of it may be carried as supplies. It is one place or the other; it isn't both.

(Testimony of Marvin Allyn.)

Q. Well now, how do you know it isn't both? Neill, Clark and Company couldn't tell whether it was both or not, could they?

A. Oh, indeed they can. They have done it.[100]

Q. Well now, this item of $178,000 that is marked as cost of goods sold includes eggs, too, doesn't it?

A. Yes.

Q. That includes all the eggs they bought of the farmers, doesn't it? A. Yes.

Q. Is that a part of a dairy product?

A. No. It is a part of the earnings of that department—the profits made on eggs.

Q. What department?

A. Dairy. It is included in there for convenience according to his managerial separation by departments. It is in that $57,000.

Q. In other words, there is no egg department?

A. No.

Q. So they put the egg department in the dairy department? A. That's right.

Q. And part of that $178,000 includes what was paid for eggs which are sold as eggs?

A. That's right.

Q. And can you ascertain what part of that went for eggs, in '45?

A. That can be ascertained, not from my record here.

Q. No, but you could get that very readily?

A. That is right. Of the sale price, I can tell you what the sale price of the eggs were.

Q. Can you get what the cost of the eggs was?

(Testimony of Marvin Allyn.)

A. I haven't that here. That can be gotten.

Q. Yes, well, $178,000 is listed here as the cost of all goods sold for the dairy unit? That includes all they paid for milk and all they paid for eggs, and part of what they paid for powdered milk and part of what they paid for sugar, but not [101] necessarily all of what they paid for sugar?

A. That is right.

Q. Some of it might have been included in cost of supplies?

A. That is right, and the same thing with your cartons—may or may not appear part in one breakdown or the other.

Q. Well, cartons, also, if that was possible, they could have charged bottles to it, couldn't they?

A. That is right.

Q. Do you know whether they did or not?

A. No, I don't.

Q. And if they did charge bottles to cost of goods sold, would they charge part of the bottles and then charge part of the bottles to supplies, both?

A. It may have been done. It's all a part of the expense and—

Q. Well, can you explain why, if the co-op had to buy a certain amount of powdered milk to use in the manufacture of ice ceram, in their bookkeeping system they would charge a part of it to supplies, part of the powdered milk to supplies and then a part of it to the cost of goods sold?

A. Yes; yes.

(Testimony of Marvin Allyn.)

Q. Why?

A. You start your accounting period with an inventory of supplies which would include the sugar or any particular item of expense for supplies — I shouldn't say expense — supplies. Then you have your purchases of that commodity during the year. At the end of the year you deduct your inventory, during your inventory adjustment. The difference between your beginning inventory and your ending inventory, very conceivably could have been put in "supplies," whereas during your current purchases during the year could have been charged direct to the [102] dairy.

Q. Well then, for instance, if you had some powdered milk left over, which is included in the inventory, that was purchased in the year '44, and that's on hand for the fiscal year '45, that might be charged to supplies, is that what you mean?

A. No, it would only be a difference between the beginning and the ending, yes.

Q. Well now, that left-over powdered milk that you have had there in your inventory after the '45 operations was purchased during '45, wasn't it? A. Yes.

Q. Then when you begin the year '46 that surplus would be charged to the supply item for '46, wouldn't it? Is that what you mean?

A. That's right. Each year stands on its own.

Q. Well then, they would have in the fall of '44 there might be a surplus of powdered milk

(Testimony of Marvin Allyn.)

left over at the conclusion of the year's operations?

A. That is right.

Q. And you start off the year '45, which is in question, and that would be charged as supplies for the year '45? You said with relation to '46 and '45 that would be true, now that would be true with reference to '45 and '44, wouldn't it?

A. Yes.

Q. But it is charged as a purchase in '44, isn't it?

A. Now, if I follow you, the amount which is actually used in the manufacture is charged to the particular year. What you have at the end of the year is transferred to the year in which it is actually used, regardless of when it was puchased. That year, [103] if it was purchased and on hand, that year's operations are given credit for.

Q. Now, let me start over: Suppose you start running that creamery down there in January, '44, and you have to have some powdered milk and you buy it and pay cash for it. Now, that is entered as costs of goods that you bought, isn't it—goes in the book somewheres?

A. (Witness nodded.)

Q. Now, when you sell that product you put in the item the cost of the goods, of that powdered milk? That all goes in there, doesn't it?

A. Yes.

Q. All the powdered milk you bought in your first year's operation is charged as part of the cost of the goods sold? A. Yes.

(Testimony of Marvin Allyn.)

Q. Then you got some of it left? A. Yes.

Q. It has all been charged once and then you charge it again the next year as supplies?

A. No, you don't.

Q. Well, that's what you said you did.

A. Well then, I didn't follow your reasoning.

Q. Well, you can get what part of that $42,000 went for eggs, can you? A. Yes.

Q. And that includes eggs that were brought here as eggs and sold as eggs, doesn't it?

A. That is right.

Q. There weren't any fresh eggs mixed with the ice cream, were there?

A. No, not to my knowledge.

Q. However, you couldn't without some time, find out what [104] the powdered milk bought for that year? That would take a little research?

A. That is right.

Q. And the sugar?

A. Yes. It would take considerable research because those records are in storage. You have to go back to the originals.

Mr. Grigsby: Is Mr. Brunelle in the office?

The Court: He is not, sir, and it may be that the exhibit is on my desk, although I do not recall having seen it today.

Mr. Grigsby: It is hard for—

The Court: Court will stand in recess for about three minutes while I make a search.

(Whereupon recess was had at 1:55 o'clock p.m.)

(Testimony of Marvin Allyn.)

After Recess

The Court: I have been unable to find the missing exhibit and I do not see that it could have been lost in my office.

Mr. Grigsby: Your Honor, the exhibit has been taken off these sheets and it is not irreparable.

The Court: I remember it distinctly because it had one column for 1945 and one for 1946 and I think Mr. Davis suggested the 1946 part was not admissible.

Mr. Grigsby: Well, your Honor, here it is.

The Court: Very well.

Mr. Grigsby: Have you any way of ascertaining from the books of the corporation, Mr. Allyn, taking the figures $57,001.58 as the net profits of the dairy unit, what proportion of that [105] profit was earned by the creamery?

A. Accurately, no. It can be—it has been done in past years on a basis which had the approval of the dairymen and the Board of Directors. It was done—

Q. For '45, was it?

A. The calculation in '45 was made. That is not approved by the dairymen.

Q. Not approved by the dairymen? Is that in your possession down there now — that calculation? A. I have some notes on that.

Q. Can you state now from the stand the amount of profit in dollars and cents that the creamery made?

(Testimony of Marvin Allyn.)

A. A separation on the same basis—a division of the $57,000?

Q. Yes.

Mr. Davis: You had better let him get his notes, maybe.

Mr. Grigsby: Yes, he can do that. I just wanted to know if he could do it.

(Witness procured his notes.)

The Witness: On the basis of the calculations made for the year 19—, fiscal year 1944—profits or earnings of the creamery I determine to be $20,457.87, and of the dairy $36,543.71.

Q. That's for '44?

A. That's for '45, following the same calculations — same basis of calculation — as was acceptable in 1944.

Q. But you haven't figured it up except on the basis of '44? For '45?

A. That's right, because the accounting system is, as I pointed out, is not a strict cost accounting system. [106]

Q. I understand, but in '44 what was the profit? You figured '45 on the basis of '44 and say there is a profit to the creamery of some $20,000. What was the profit in '44? Well, can you say whether it was about the same or not?

A. In '44 it was more. In—

The Court: Before you go into that: You have used two words here, dairy and creamery. I think

(Testimony of Marvin Allyn.)

I understand dairy; what does the word creamery cover?

The Witness: The creamery is the Palmer creamery, including the profit on production other than milk—other than raw milk.

The Court: That would include eggs and ice cream?

The Witness: Eggs and ice cream.

The Court: All right, go on.

The Witness: I would like to repeat: This was what was considered to be, and was accepted by all parties, as the fair and equitable separation.

Mr. Grigsby: In '44?

A. Yes. Of necessity it is arbitrary.

Q. Very well, now——

The Court: Now, let me see; just a minute. The basis of it is what was arrived at in '44, but these figures you have given me apply to '45? You have taken the '44 formula and applied it to 1945 and you come out with the creamery $20,457.87 and the dairy $36,543.71, is that correct?

The Witness: That is right.

The Court: You simply take the 1944 formula and apply to '45 [107] and get these figures?

The Witness: That is right.

Mr. Grigsby: Well, the formula for profits of the creamery: You would have to list the cost of anything they bought that was processed there—that would be one item there, wouldn't it? They bought powdered milk. Now, that would enter into

(Testimony of Marvin Allyn.)

it, wouldn't it? And had on hand some and you would figure that at the cost price?

A. Well, let me explain——

Q. Wait a minute, before you explain: Can you answer that? Would it include—in figuring the profits of the creamery down there, would you figure what the stuff cost that you bought that went into their product? You would, wouldn't you, and what it sold for?

A. That is right.

Q. That would include the cost of powdered milk, wouldn't it? A. That is right.

Q. Well, now, do you know what proportion in dollars of what you bought that went into the article that was sold—for instance, ice cream—was bought from the farmers? Was that segregated?

A. No.

Q. That isn't segregated?

A. The separation was made on the basis of the proportion of sales of milk and cream as to all other production of that department.

Q. Yes. All right, now then the proportion of profit: How was that arrived at? Was that in proportion to the proportion of sales?

A. In the same proportion. [108]

Q. So, you figured the profit must have been in proportion to the sales? A. That is right.

Q. That wouldn't necessarily be so, would it?

A. No. It must be—it was acceptable arbitrary formula.

Q. Well, as far as you know from anything

(Testimony of Marvin Allyn.)

you have here you don't know that the creamery made any money in 1945, do you?

A. Or the dairy—we know that together——

Q. Together they made $57,000? A. Yes.

Q. But you don't know what part of that the creamery earned? A. No.

Q. Nor that it earned any part of it?

A. That's right.

Q. This year they have started a new system down there so as to a year from now you will probably be able to give those figures on it?

A. That is right.

Q. You have inaugurated that new system yourself? A. That is right.

Q. Because they had no system before that of segregating that proportion?

A. That is right.

Q. Now, according to your books here, from which you took this sheet — Exhibit 3 — they advanced the Produce Department — that would be for vegetables, I understand—$76,976.05, is that correct? (Handed paper to witness)

A. $76,000, cost of goods sold, yes.

Q. That is the cost of vegetables, isn't it?

A. Yes.

Q. That wouldn't include eggs?

A. No; no.

Q. That wouldn't include eggs?

A. No; no. [109]

Q. That's what the farmers grew and sold to the co-op, isn't it? A. That's right.

(Testimony of Marvin Allyn.)

Q. Now, the sales of all that were what amount there? A. $101,697.97.

Q. Now, that $76,000 marked here as cost was all paid to the producers, wasn't it, down there at the Matanuska Valley—farmers, for vegetables?

A. I believe so, yes.

Q. They didn't buy any anywhere else?

A. It would have been nominal if there was.

Q. Yes, and so they advanced or paid, or put it anyway you want to, they advanced the farmers 75% of what they ultimately got for their goods, didn't they? $76,000—approximately 75%?

A. That is right.

Q. They made a gross profit over and above the cost, which is $76,000 and the sales price is $101,697—of $24,721?

A. $24,000, yes, gross profit on sales.

Q. But the operating expense of the Produce Department was $40,045 and indirect overhead $4995, so that they lost $20,000?

A. ——$319.12.

Q. Now, they advanced the dairymen, according to your figures this morning, something over $136,000? A. That is right.

Q. Which would be about 35% as compared with 75% they advanced the farmers, is that right?

A. It is comparing the same figures for the different departments.

Q. Now, do you know, having overpaid the farmers for '45 the [110] sum of $20,319.12, is that now

(Testimony of Marvin Allyn.)

charged against those farmers? Do they owe that money? A. No.

Q. Is that an indebtedness cancelled? How do they adjust that?

A. That is absorbed by the Association.

Q. Is that absorbed by this $57,000 profit?

A. No, it is absorbed by the Association as a whole. In other words, the separation of this entire operation of all departments which yielded net for the year of $2,889—that is the amount that was determined that in that department—for some reason that department was not productive—did not make an earning for the Association. The other places the Association did have earnings, and so that you would know where you were losing and where you were gaining, that is the figure that was arrived at from such records as were kept as to the net loss of that department.

Q. But they paid the farmers for their produce $20,319 — more money than they got for the produce — added to what it cost to handle it?

A. That's right.

Q. They got $101,697.97 for the farmers' produce? A. That's right.

Q. And it cost them $40,045.42 to handle that—operating expenses?

A. That's right. It's the difference between——

Q. And their share of the indirect overhead is $4,995.62, so they paid them $20,319 too much, didn't they?

A. The members were paid for a certain amount

(Testimony of Marvin Allyn.)

of produce. All the produce that was brought in, the Association paid so much for that produce. You [111] have a shrinkage; you have spoilage—all your operating——

Q. Well, you lost money?

A. And they lost that much money.

Q. Well, they paid them $20,000 too much to break even? A. That is right.

Q. Of course, maybe you aren't familiar with it, but take the potatoes, for instance: That isn't a daily crop item, is it? A. No.

Q. That is one crop a year?

A. That is right.

Q. In this Territory, and that's in the fall? And they have what you call new potatoes?

A. That is right.

Q. And they are brought here and sold on the market? A. That is right.

Q. Now, do you know what they advanced the farmers on new potatoes? A. I don't know.

Q. Do the books show?

A. I—of course, it is in the books.

Q. Well now, new potatoes, brought by the farmers, delivered at Palmer and then brought and marketed here in the way they do market, it is sold by the stores—there isn't much other handling is there? There is no storing or grading of new potatoes, or do you know?

A. There would be sorting, grading, packaging.

Q. Of new potatoes?

A. Oh yes. They all must be graded; they must

(Testimony of Marvin Allyn.)

be cleaned; they must be sacked and marked; they must be transported; they must be held for a short period of time.

Q. And then the balance of the crop of potatoes is stored and put in the warehouse and graded and sold from time to time during [112] the winter. Because it costs more to handle that that is sometimes re-graded, isn't it? A. That is right.

Q. Now, do you know that it is the custom, or was it the custom in 1945 to advance the farmers $4.00 on new potatoes where the market price was five, and that they held out 20% for the cost of handling those potatoes?

A. I can't answer that question. I don't know.

Q. So that, anyway, they could anticipate, could they not, what the costs of marketing new potatoes would be? They know what's necessary to be done to handle new potatoes right away?

A. I think so.

Q. Of course, you don't know anything about any agreements that were made as to the final price for products because you weren't here?

A. That's right.

Q. Is this audit accepted by the corporation as a true audit of their operations for 1945?

A. It is.

Mr. Grigsby: We offer it in evidence, your Honor.

The Court: Is there objection?

Mr. Davis: No objection.

(Testimony of Marvin Allyn.)

The Court: It may be admitted as Plaintiff's Exhibit 6.

(Plaintiff's Exhibit No. 6 admitted in evidence.)

Mr. Grigsby: I believe the copy, your Honor, can be the one marked as an exhibit. They are both the same, are they not?

A. They are just the same. [113]

The Court: That may be admitted as Plaintiff's Exhibit No. 6.

Mr. Grigsby: That's all.

The Court: Do you wish to examine, Mr. Davis?

Mr. Davis: Yes, your Honor.

Cross-Examination

By Mr. Davis:

Q. Mr. Allyn, you are the Chief Accountant and General Manager at the Palmer co-op?

A. That is right.

Q. And you have been there about two months now? A. About two months.

Q. What is your background, Mr. Allyn, for this sort of work?

A. An agricultural college major in agriculture cooperative marketing, seminar work in cooperative marketing, a short period with the Farm Credit Administration visiting cooperative associations for the bank for cooperatives, and employment since 1937 in the Whatcom County Dairymens' Association, in Bellingham, Washington.

(Testimony of Marvin Allyn.)

Q. And that was from 1937 for what period?

A. With the exception of military service, until the 15th of January of this year.

Q. When did you go in the Army, Mr. Allyn?

A. In May of 1942.

Q. Then you were with the Whatcom County Dairymens' Association about five years—in that neighborhood—1937 to 1942?

A. '42, yes, and then since—then I was back with them for a period before coming to Alaska.

Q. Now, Mr. Allyn, we had a lot of discussion here about the items in that audit on cost of goods sold and the items for supplies. Of course, you didn't, yourself, make the audit and you don't know exactly what items went into either column, but as a matter of fact, does it act any different on the net result as to which column a particular item may be put in? Would you get the same result on your net profit, as long as an item went in one column or another, regardless of which one it went in?

A. No, it would make no difference.

Q. Make no difference at all, as long as the items were reflected there? A. That is right.

Q. And you are of the opinion, since this audit was made by a recognized accountant, that he did audit and find that there are no duplications, is that right? A. That is correct.

Mr. Grigsby: We object to what his opinion is as to what was found.

(Testimony of Marvin Allyn.)

Mr. Davis: You brought it out, Mr. Grigsby.

The Court: Overruled. You may answer. He has answered.

Mr. Davis: Now, this item of $83,000 expenses of the Dairy Department: I may have misunderstood you this morning, but I thought you said something about that item being proportioned?

The Court: Being what?

Mr. Davis: Being proportioned with some other department. Now, I want to know what that item of $83,000 plus is. Would [115] you like to have a copy of the audit?

A. No; no, I am—that should be the expenses which they could attribute directly to the operation of that department.

Q. Those are the direct expenses of that department?

A. Yes, insofar as they could—within the limit of their accounting system.

Q. Now then, the other item—the indirect overhead—would you tell us what that includes?

A. That would be expenses other than these which they could apportion directly.

Q. And is it possible that some of the items which are called indirect overhead here are actually direct expenses of the department but can't be ascertained from the books?

A. That could be, yes.

Q. I call your attention particularly to the steam that the dairy might have used. That would be,

(Testimony of Marvin Allyn.)

if it could be segregated, would be a direct cost of the dairy, wouldn't it?

A. That is right.

Q. Then why is that put in indirect overhead? Can you explain that to the Court?

A. The dairy and creamery are in one building; your office administration building is another building; your warehouse is another building. But, for example, the administration building: The dairy has got to carry part of the expense of the steam for the administration building—that would be an indirect expense to the dairy as their share.

Q. In other words, then, that steam is used by various departments and there is no way of determining just how much of [116] it goes to the dairy, is that right? A. That is true.

Q. And when you add together the direct overhead, the direct expenses, and the indirect overhead of this particular department, then you come to the cost of selling the goods, is that correct?

A. That's right.

Q. I think this morning Mr. Grigsby asked you whether or not that figure, then, the cost of selling the goods, would be the item in the contract—item number (b) of Sec. (7) of the contract says:

> "reasonable charges for the services of receiving, handling and selling said agricultural products under Paragraph 5 of this Contract;"

Now, is that necessarily true that the cost of selling those goods is the reasonable—is a reasonable charge for handling the goods?

(Testimony of Marvin Allyn.)

A. I am of the opinion that it takes the entire Association, the maintenance of the whole Association and operation of the whole unit to handle all of the products of the community.

Q. Now then, what I wanted you to answer, is the cost of selling the commodity necessarily a reasonable charge for handling that commodity?

A. I think not.

Q. Quite likely to be some other expenses that might have to be met, aren't there, in this co-op?

A. That is right.

Q. I think you testified that so far as you can tell from the books, that the indirect overhead has been proportioned according [117] to the proportion that the total sales of the Dairy Department, insofar as the Dairy Department is concerned?

A. That's right.

Q. The total sales of the Dairy Department to the total sales of the entire co-op? Now, is that correct? A. That is correct.

Q. Now, I notice in going over the figures that so far as the Produce Department is concerned, the indirect overhead is based on a 5/12's basis. Are you acquainted with the reason for putting the produce in indirect overhead on a 5/12 basis rather than a 12/12 basis?

A. My understanding is that it was done sometime ago on the theory that the Produce Department operates five months of the year, or 5/12's of the total year.

(Testimony of Marvin Allyn.)

Q. And, therefore, the indirect overhead is proportioned on that basis, is that right?

A. Yes, that is my understanding.

Q. Now, let's go back a minute to this figure of cost of goods sold. Now, as an accountant when you are setting up cost of goods sold, as a matter of fact you take first an inventory of the preceding year, don't you, at the beginning of the year? A. That's right.

Q. You add to that all the purchases during the year in question, is that right?

A. That's right.

Q. Then you subtract from that the inventory on hand at the end of the year?

A. That's correct.

Q. And that's the way you arrive at this cost of goods sold figure? A. That is correct.

Q. And cost of goods sold in the year in question, of the [118] Matanuska Valley co-op, include milk, eggs, ice cream powder and all supplies that go into the manufactured product, is that correct?

A. It would include those, yes.

Q. With the exception that you said possibly some of the supplies which ought to go in cost of goods sold might have been put in the other column of supplies?

A. That's correct, with that qualification.

Q. Now. normally, would bottles go into cost of goods sold—the cost of purchasing the bottles?

A. Normally it wouldn't.

Q. Normally it would? A. It would not.

(Testimony of Marvin Allyn.)

Q. It would not? And ice cream cartons might or might not, depending upon the accountant that was handling the job?

A. In my opinion, ice cream cartons would, because they are not re-used.

Q. How about bottle tops—caps? Which item would that go in?

A. They would go into the cost of goods sold because they are not re-used.

Mr. Grigsby: Because what?

The Witness: They are not re-used.

Mr. Davis: Would they go into the cost of goods sold, Mr. Allyn, or into the cost of supplies, because they are not re-used?

A. I would consider them to be properly in the cost of goods sold.

Q. All right. How about cleaning equipment—soap, brushes, things like that?

A. That would definitely be a supply items.

Q. Uniforms for the help? A. Supplies.

Q. Now then, I think the judge brought out the point I wanted [119] to bring out on this calculation you made, but just to be absolutely sure we have got it right, is this breakdown between the creamery and dairy, the 1945 figures, figured according to the same formula used in the 1944 operations?

A. That is correct.

Q. The figures you have used have nothing to do with 1944 at all, is that correct? A. No.

Q. But the way you arrive at the figures is according to the formula used on 1944?

(Testimony of Marvin Allyn.)

A. That is correct.

Q. Now, to get the thing absolutely clear here, will you tell the Court what you consider in the creamery end of this department and what you consider to be the dairy? Let's start off, now: Ice cream, which department would that be in?

A. That would be in the creamery.

Q. And popcicles? A. Creamery.

Q. Malted milk — chocolate milk, I should say?

A. Creamery.

Q. How about eggs? A. Creamery.

Q. Can you think of anything else there that should go into the Creamery Department?

A. Butter—re-sale butter; other supplies, skim milk for feed.

The Court: Did you have any cottage cheese?

The Witness: Not during that year, your Honor. Milk powder re-sold, buttermilk, ice cream mix——

Mr. Davis: Generally speaking, then, with the exception of the eggs—I am talking now about the Matanuska eggs—generally speaking, the Creamery Department is the sale of the manufactured [120] products or the incidental sale of some raw products that would normally go into your manufactured product, is that right? For instance, your sale of a certain amount of powdered milk?

A. That's right.

Q. And then what, in this breakdown, was comprised in the Dairy Department—the dairy branch of this thing?

(Testimony of Marvin Allyn.)

A. Milk and cream and skim milk sold for human consumption.

Q. All right, and you are unable to ascertain from the figures that you have as to whether or not the dairy made all of the $53,000, or whether the creamery made it all or what proportion either one might have made, is that correct?

A. That is correct.

Q. Or what proportion, for that matter, eggs amounted to in that figure?

A. That is correct.

Q. I used the 53,000 figure because I thought you could ascertain the other 4,000 of the 57. Will you tell the Court what that figure is? What is represented between the figure of $53,000 on your balance sheet and the figure 57,000?

A. That is the rents from the apartments above the—in the Anchorage Dairy building.

Q. Do you know why those items of rent are carried as being in the Dairy Department?

A. Their geographical location, for convenience —the rents are collected by the personnel of the Anchorage Dairy, the administration is there, and when their funds are transmitted to the accounting office at Palmer they are included [121] as a part of the fund for transportation.

The Court: Is there any accounting justification for it?

The Witness: For their inclusion?

The Court: From an accounting standpoint, is there any justification?

(Testimony of Marvin Allyn.)

The Witness: None whatever.

Mr. Grigsby: What was your Honor's question?

The Court: I say, from an accounting standpoint, is there any justification in carrying the rentals in the dairy and creamery account, and the answer of the witness is "none whatever," as I understand.

Mr. Davis: And that would also go as to the eggs, I suppose? There is no accounting justification for carrying eggs as part of the Dairy Department? A. That is right.

Q. But that is the way it has been done and was done in '45? A. That is right.

Q. And this $57,000 figure we are talking about, then, includes an item of rent and an item from eggs? A. That's right.

Q. And all the items from the dairy and the creamery, they are all mixed up together?

A. That is right.

Q. However, you can ascertain the amount that is attributable to rent? A. That is right.

Q. The rest of it you can't ascertain?

A. That is right.

Q. And the breakdown you gave Mr. Grigsby is an arbitrary breakdown that was made in 1944 and you followed the same breakdown [122] in arriving at the figures for '45?

A. That's correct.

Q. Mr. Allyn, turn to that audit there which is a copy of Exhibit No. 6, I believe, your Honor?

The Court: Yes, No. 6.

(Testimony of Marvin Allyn.)

Mr. Davis: Now, you told Mr. Grigsby that the Produce Department lost some $20,000 in 1945. I would like to ask you whether any other departments of the co-op lost money during that year and if so, how much?

A. In the year 1945 the store lost $10,095.68; the garage lost $20,331.29; hotel and staff houses, $2,116.04; meat department $13,319.08. You said other than produce?

Q. Yes, we have already got the produce figure. Well, you might as well just to get them all there re-mention it.

A. Produce Department lost $20,319.12.

Q. Now, Mr. Allyn, did some of the other departments besides the milk department make money?

A. Yes, warehouse, $10,315.62; community hall and fountain, $1,753.28; dairy and creamery, $57,-001.58, with the qualifications that have been brought out.

Q. I am sorry, did you say with the qualifications—?

A. Yes, of rents—including the rents and the profit on eggs and these others, the Creamery-Dairy Department showed an earning of $57,001.58.

Q. All right, now then, what was the net result of the operations of the co-op for fiscal 1945?

A. A net profit of $2,889.27. [123]

Q. Mr. Grigsby asked you something to the effect that it must appear that the produce farmers had been overpaid $20,000 because that department

(Testimony of Marvin Allyn.)

lost some $20,000. Now, I am asking you if it necessarily follows that the farmers were overpaid because the department lost money?

A. It doesn't necessarily follow.

Q. Supposing that a lot of potatoes had been bought by the co-op and have been lost by freezing or some such matter, that might account for the loss, mightn't it? A. It might.

Q. Or shrinkage might account for it?

A. It would.

Q. Or, for that matter, failure to sell the potatoes might account for it? A. That is right.

Mr. Davis: Your Honor, at this time I would like to offer the '43—I mean the '44 audit, which is on your Honor's desk.

The Court: Any objection?

Mr. Grigsby: No objection.

The Court: It may be admitted as Defendant's Exhibit No. 1.

Mr. Davis: I haven't identified it yet, but I think everybody knows what it is.

The Court: Well, we can give it to the witness.

(Defendant's Exhibit No. 1 admitted in evidence.)

Mr. Davis: Mr. Allyn, can you tell the Court what this is?

A. This is a copy of the Articles of Incorporation and Code of By-laws of the Matanuska Valley Cooperating Association.

(Testimony of Marvin Allyn.)

Mr. Davis: Your Honor, I would like to offer this——[124]

Mr. Grigsby: What is it?

Mr. Davis: A copy of the Articles and By-laws of the Association.

Mr. Grigsby: No objection.

The Court: It may be admitted as Defendant's Exhibit No. 2.

(Defendant's Exhibit No. 2 admitted in evidence.)

Mr. Davis: Can you tell the Court what the paper I have just handed you is?

A. This is a schedule of the plaintiffs' production—the amount of money claimed.

Q. In this suit?

A. In this suit, and the money paid and deducted for other deductions.

Q. As to each individual plaintiff?

A. As to each individual plaintiff.

Q. Now, Mr. Allyn, did you prepare that paper?

A. No, I did not.

Q. Was it prepared under your direction?

A. It was prepared in the office of the Association.

Mr. Davis: I would like to offer this into evidence, your Honor. (Handed paper to Mr. Grigsby.)

Mr. Grigsby: I have no objection.

The Court: It may be admitted as Defendant's Exhibit No. 3.

(Defendant's Exhibit No. 3 admitted in evidence.)

DEFENDANT'S EXHIBIT NO. 3

Cause	Name Claimed	Pounds Grade A	Pounds Grade B	Money Claimed	Money Paid	Hauling	Mdse. Deduct.	2% S.R.
1.	C. R. Monaghan	119,488		$ 3,285.04	$ 7,716.83		$ 2.05	$ 157.08
2.	Frank McAllister	168,842		4,497.30	9,948.57	$ 590.94	16.20	215.02
3.	Merle L. Anderson	130,910	8,656	3,969.78	8,894.92	488.49	16.61	189.79
4.	A. A. Rempel	48,925		1,040.14	2,310.92	172.00	13.30	49.73
5.	Arvid Johnson	95,567		2,686.54	6,061.82	334.48	18.65	128.43
6.	Jack Cope	67,321		1,897.02	4,232.89	235.63	24.75	90.66
7.	William Ising	85,157		2,356.84	6,676.82	*1,150.92*	31.00	112.67
8.	Joseph Lentz	42,856		1,201.92	2,727.69	64.19	54.10	57.74
9.	Clarence Quarnstrom	33,595		1,095.37	2,435.77	135.50	11.65	52.37
10.	Thomas Moffitt	81,451	1,601	2,274.08	5,140.87	285.08	5.90	109.66
11.	Paul Nelson		36,170	822.57	1,973.40	*51.13*	23.90	39.35
12.	B. J. Lossing	52,053		1,400.28	3,312.39	182.21	20.00	71.71
13.	Chet Liebing	1,475	36,557	948.19	2,152.13	84.11	21.20	45.32
14.	Alvin J. Collier		9,851	238.06	474.39	84.00		11.41
15.	William Lentz	58,303	4,219	1,711.25	3,757.66	201.19	64.70	81.84
16.	Henning Benson		32,299	723.41	1,729.41		1.90	34.60
17.	Walter C. Huntley	32,236		942.23	2,116.81	135.76	9.90	45.05
18.	Lawrence Plumley		15,790	358.56	820.00		20.00	17.15
19.	H. S. Bauer		6,196	147.69	336.13	7.70	3.00	7.07
20.	A. R. Moffit	63,949		1,851.00	4,104.56	223.83	7.65	88.50
21.	Leonard Bergan		2,643	66.10	167.87	*13.06*		3.16
22.	Harold Thuma		23,004	551.86	1,180.31	127.35	7.00	26.40
	Total	1,082,128	176,986	$34,065.23	$78,272.16	$2,137.35	$373.46	$1,634.71

Attached to the above are adding machine tapes showing the following figures:

78,272.16	7,716.83	(Cont.) 2,435.77	(Cont.) 4,104.56	$82,417.68
2,137.35	9,948.57	5,140,87	167.87	
373.46	8,894.92	1,973.40	1,180.31	
1,634.71	2,310.92	3,312.39	———	
———	6,061.82	2,152.13	78,272.16	
82,417.68	4,232.89	474.39		
	6,676.82	3,757.66		
	2,727.69	1,729.41		
		2,116.81		
		820.00		
		336.13		

[Italicized figures shown in red.]

[Endorsed]: Filed August 5, 1948.

(Testimony of Marvin Allyn.)

The Court: What is the general name of this, Mr. Davis?

Mr. Davis: Your Honor, it is a statement of the account of [125] the milk sold by the plaintiffs, of the amount paid to the plaintiffs in money or by deductions, and of the amounts claimed by the plaintiff.

The Court: Very well.

Mr. Davis: Now, Mr. Allyn, did you prepare that or have it prepared?

A. This was prepared at my instruction.

Q. Can you tell the Court what it is?

A. This is a schedule of milk prices paid to the farmers from December 1, 1941, showing the changes to and including October 1, 1946, for Grade A and Grade B milk.

Q. And also showing the difference on tests, Mr. Allyn?

A. It shows two tests, 4% and a 4.5%, the price and the price calculated for each test.

Mr. Davis: We offer this schedule in evidence, your Honor. (Handed paper to Mr. Grigsby.)

The Court: Mr. Allyn says he has another copy which may be supplied to Mr. Grigsby if desired.

Mr. Davis: I think we have several copies, your Honor.

Mr. Grigsby: Well, is this dollars here?

Mr. Davis: Yes.

Mr. Grigsby: We have no objection.

The Court: It may be admitted as Defendant's Exhibit No. 4.

(Testimony of Marvin Allyn.)

(Defendant's Exhibit No. 4 admitted in evidence.)

DEFENDANT'S EXHIBIT NO. 4

Milk Prices Paid to Farmer

Date	Test	Grade A	Grade B
Dec. 1, 1941	4.0	4.00	2.44
	4.5	4.50	2.74
Jan. 15, 1942	4.0	4.40	2.84
	4.5	4.95	3.20
Above figured by net x test B.F. x 1.00			
		1.10 for grade A	
		x .61	
		.71 for grade B	
Feb. 1, 1943	4.0	5.10	3.75
	4.5	5.40	4.05
Apr. 22, 1943	4.0	6.20	4.85
	4.5	6.50	5.15
Aug. 1, 1945	4.0	6.70	5.35
	4.5	7.00	5.65
Sept. 1, 1945	4.0	7.20	5.85
	4.5	7.50	6.15
Sept. 16, 1945	4.0	7.70	6.35
	4.5	8.00	6.65
May 1, 1946	4.0	6.70	5.35
	4.5	7.00	5.65
July 1, 1946	4.0	6.70	4.00
	4.5	7.00	4.30
Sept. 1, 1946	4.0	7.70	4.00
	4.5	8.00	4.30
Oct. 1, 1946	4.0	8.70	4.00
	4.5	9.10	4.40

Footnote:—There is an increase from summer to winter rates beginning September 1, 1945. From December 1, 1944, thru February 1945 was no increase in rate paid but a winter bonus applied. Bonus—50c per 100 lbs.

[Endorsed]: Filed August 5, 1948.

(Testimony of Marvin Allyn.)

The Court: On that, Mr. Allyn, does Defendant's Exhibit No. 4 [126] embrace all of the payments that were made to the milk producers for those years, or only the initial payments which the plaintiffs here call advances made during the course of the season without any reference to what may have been paid after the close of the year, but on account of milk produced during the year?

The Witness: That is the initial payment regardless of whatever it is called. That was the—that is the price of the milk upon delivery to the dairy association.

The Court: Then if the milk producers were paid anything afterwards, that is not included in Exhibit No. 4?

The Witness: That is not included.

Mr. Davis: That figure, Mr. Allyn, is the figure upon which these bimonthly payments are paid?

A. That is correct.

Q. Have been paid over the period of time?

A. That is correct.

Mr. Davis: That is all, Mr. Allyn.

Redirect Examination

By Mr. Grigsby:

Q. Now, Mr. Davis asked you if you considered the figure 83,000 and some dollars, which is charged as operating expenses of the dairy unit—dairy and creamery unit— was a reasonable charge, and did I understand you to answer that it probably wasn't

(Testimony of Marvin Allyn.)

enough? Is that right? Probably ought to have been more? Did you so answer? Mr. Davis called your attention to Sec. (b) of Paragraph (7)—reasonable charges for the services of receiving, handling and selling—and asked you if $83,000 would be a reasonable charge for that service——

Mr. Davis: That wasn't my question, Mr. Grigsby; I also added in indirect overhead and asked him if it was necessarily the reasonable charge mentioned in the contract.

Mr. Grigsby: Yes; well, all right. That was one question as to whether you considered that a reasonable charge and Mr. Davis asked you if there might have been other items of expense which would have raised that. Now, do you consider that a reasonable charge, for the service it is charged for? I will withdraw the question.

A. Not necessarily.

Q. Well, it purports, according to the books, to be the cost of the service, doesn't it?

A. Insofar as—yes.

Q. The direct cost? A. Yes.

Q. And then in addition to that, the charges were apportioned in proportion to the amount of business they did of the other expenses, known as indirect overhead? A. That's right.

Q. Now these—what's listed in the books as operation expenses of each unit—added to the indirect overhead of each unit, constitutes all the expenses?

A. That is right.

Q. And there wasn't any other expense? There is

(Testimony of Marvin Allyn.)

no other expense they have been to except under those two heads? The indirect overhead, added to operation expenses of each unit, constitutes all expense, doesn't it?

A. That is the part of the operating expense which it was calculated to be chargeable [128] directly to the dairy and the creamery combined.

Q. Certainly, but there is a certain operating expense charged to each unit, isn't there?

A. That's right.

Q. And there is a certain indirect overhead charged to each unit. Now, all the operating expense charged to all the units, plus all the indirect overhead charged to all the units, is the entire expense of operating the co-op?

A. Except insofar as they neglected to set up reserves for repairs, which weren't made, and make provisions to pay off indebtedness due in the future.

Q. Well, but I am not talking about provisions—I am talking about the expenses of running that thing down there for the year 1945. They are——

A. They are an expense of any business.

Q. Now, my question is very simple and the reason I am asking it is because Mr. Davis said there might have been some other expense which should have been added to this $83,000. Now, all the expenses chargeable to the year 1945, incurred by the co-op, consist of the operating expenses of all the units, which can be directly charged to each unit separately as you have done in your books, plus their proportion of the indirect overhead. Now, that constitutes all expense, doesn't it?

(Testimony of Marvin Allyn.)

A. May I answer that with an explanation?

Q. Yes.

A. We are getting at the fundamental question before the Court as to whether a cooperative is a collection of individual and separate departments, or whether it is a cooperative organization, [129] and that's I believe, is where this difference is coming in.

Q. But that hasn't anything to do with my question. Mr. Davis asked you if some other expense could be added to operating expenses for handling the goods, other than this $83,000.

Mr. Davis: That wasn't my question.

The Court: Well, one at a time.

Mr. Grigsby: Well, the record will show that. And that's the only reason I am wasting the time. Do you know of any other expense that was incurred in the year 1945 for running that co-op other than that indirect overhead plus the total operating expenses of all the units? Now, did it cost them——

A. No.

Q. Now, that's what I am getting at. Now, you said there was no justification for including the rents for this apartment down here where the dairy building is as a part of the profits of the dairy. You say there is none? Well, all the expenses of running that are charged to the dairy, aren't they, in those books?

A. In the attempt to find out the net result of handling and processing the milk and other products——

Q. All right, now, here's your dairy business, and

(Testimony of Marvin Allyn.)

they pay so much for a lot down there, don't they, where that dairy is here in town—where the distribution center is? I believe it is testified to here in this place, and you testified to it or heard it, that they paid rent for the lot on which that building sets? That is charged as an expense of the dairy unit, isn't it? [130] A. Yes.

Q. And there was an item of something over $2,000 for power that's used down there?

A. That's right.

Q. In town here? A. That's right.

Q. And that's charged as an expense to the dairy unit, isn't it? A. That is right.

Q. And the employees' wages down here, that is charged as an expense? (No response.) And then there is a credit of so much for rent of an apartment that is properly charged—it should be charged as a credit to the dairy, unit, shouldn't it?

A. No, I believe not.

Q. Why not?

A. I believe the tenants pay their own light bills. I know for a certainty that they buy their own fuel—that is their cooking gas. The improvements, the money invested to make those apartments habitable, were funds that came from the Association, or an investment by the entire co-op—not by the Dairy Department.

Q. Well, all right, now: Is there any place in your books where any revenue or expense is charged directly to the entire co-op? It is always charged to some unit or credited to some unit, isn't it?

(Testimony of Marvin Allyn.)

A. My understanding is——

Q. Well, isn't it—to some unit?

A. I can't answer that yes or no. At the present time we are charging them by departments. In these years I believe that it was charged—the expense was charged into an account and broken down to departments. [131] It was an expense classification.

Q. Well, what department would you put that rent into if you wouldn't credit it to the Dairy Department? A. Rental income.

Q. Well, is there such a department?

A. It would be shown as an income account from rent.

Q. Well, is there such a department?

A. It isn't a department; it's an account.

Q. Well, there isn't any such department?

A. No, it's a miscellaneous income account.

Q. The dairy is charged with heating that building, isn't it? A. Yes.

Q. It is charged with every expense connected with with that building, isn't it? A. Yes.

Q. Well then, wouldn't it be proper to credit it with everything earned by that building?

A. No.

Q. Very well, now, the operations of the Dairy Department include the cost of handling eggs?

A. It would.

The Court: What is that?

Mr. Grigsby: Eggs.

The Court: I thought that was charged to the creamery.

(Testimony of Marvin Allyn.)

Mr. Grigsby: That's dairy and creamery. The eggs are delivered at the Palmer plant, aren't they?

A. That is right.

Q. And then shipped here and sold as eggs?

A. That is right.

Q. And the expense of handling those eggs is included in that $83,000? A. That is true. [132]

Q. That is charged to the dairy unit?

A. That's right.

Q. The dairy and creamery consist of one unit?

A. That is right.

Q. And the cost of those eggs is included in the figure $178,000, cost of goods sold?

A. That is right.

Q. The dairy and creamery?

A. That is right.

Q. Now, may I see that audit of 1945? You have one, Mr. Davis, that is not in evidence?

The Court: Would you mind suspending a few minutes, Mr. Grigsby?

Mr. Grigsby: May we have 10 minutes?

The Court: Court will stand in recess until 18 minutes past three.

(Whereupon recess was had at 3:08 o'clock, p.m)

After Recess

Mr. Grigsby: Mr. Allyn, the total indirect overhead charged to the dairy and creamery, according to your Page 19 of the audit and expressed here on this Exhibit 3 which you prepared was $45,121.31 is that correct? A. Indirect overhead?

Q. I am correct in the figure?

(Testimony of Marvin Allyn.)

A. Well, whatever the audit report is.

Q. Well, this was taken from the audit report?

A. This should be the same.

Q. Well, it is the same——

The Court: What is the same?

The Witness: 45,000-something for indirect overhead for the [133] creamery and dairy.

The Court: Yes. It is broken down in three figures here.

The Witness: Yes.

Mr. Grigsby: Now, that's 45,000 that you just testified about is made up of $12,220 charged to the dairy for the operation of the power house, $9,521.94 to the cabinet shop, and $23,378.93 to general and administration expenses. Those are the sums that total 45,000, is that right.

A. That should be correct. That was the intention.

Q. Now, what is the 12%? What does that mean there—that 12%?

The Court: 12.494.

The Witness: 12.494, that would be the percent of this 128, I believe.

Mr. Grigsby: That the dairy-creamery is charged? They are charged with 45,000 or more which would be over 30%. Is that 12% of the total sales, perhaps? A. 45—of the 128,000.

Q. Of the 128,000 the dairy-creamery is charged with 45,000? A. Yes.

Q. Which is more than a third, so it couldn't be

(Testimony of Marvin Allyn.)

12% I am just curious to know what the 12% means there?

A. It is some calculation of this total indirect overhead on the basis of—this equals a hundred percent.

Q. They are all charged with 12?

A. 12.494, with the exception of the Produce Department, who are 5/12. This 12.494 [134] would be the percentage on the basis of sales.

Q. But they couldn't be all the same, then?

A. No, here's your method: The indirect overhead is apportioned to the various departments on the basis of sales, that is correct. And then this is a percentage of—no, that isn't right either. Well, can we go on and come back to this—give this a little study.

Q. Yes, except I am—Now, on that sheet it is stated that the apportionment of indirect overhead charged to the different units is prorated on the basis of total sales? A. That's right.

Q. With the Produce Department standing 5/12's of normal. Now, you have explained that that figure 5/12, means five months out of 12 months of the year. If that is so, what does normal mean there? It is always 5/12's—five months is always 5/12's of a year, but you have got the Produce Department standing 5/12's of normal.

A. The 7/12's—the balance of 7/12's, is there but prorated to the other departments, leaving the 5/12's of the normal figure on the basis of sales left in the Produce Department.

(Testimony of Marvin Allyn.)

Q. Now, do you think those figures, 5/12's—you have just been told that alludes to five months out of the 12 months? A. That is true.

Q. Well, they handle the vegetables all winter, don't they?

A. The storage vegetables, yes, but their activity —it would be during the harvest period for the vegetables. [135]

Q. Well, five months might be the growing season, but while the crop is in the ground there isn't any storage connected with the agricultural product or any expense to the co-op—for the growing of that product?

A. But you have crops being harvested in at successive periods.

Q. Well, the bulk of the vegetables are one crop, aren't they, or maybe two—two crops of cabbage, perhaps, and one crop of potatoes?

A. Well, you start with your small root crops—your radishes, for instance, would be your first vegetable that would be handled, probably, and then your lettuce, celery, beets, carrots, rutabagas, taking different periods for maturity, so that your produce would——

Q. Now, Mr. Allyn, isn't this—in 1944, the sales of the Produce Department—that is, vegetables—were $268,806.78? A. That's right.

Q. And in 1945, they were $101,697.97?

A. That's right.

Q. Now, in 1945, they were just about 5/12's of what they were in 1944. Now, haven't they taken the

(Testimony of Marvin Allyn.)

peak year as the normal year as compared with the year 1945?

A. This has no—my understanding is that has no relation to one year as against another.

Q. Well, what does normal mean there?

A. They determined that it would be spread on the basis of sales. Then they thought that in comparison to the Dairy Department, which operates every day—every day of the year—that in the production and handling [136] of produce that most of their activity was limited to a partion of the year. Therefore, it would be unfair to charge them at the same rate as if they were in full production the year round, and I am told that is the reasoning behind this 5/12's.

Q. You were told that by whom?

A. Members of the Association—members and directors.

Q. Can you name the man that told you, any of them?

A. It could be anybody. It's common knowledge; it is accepted.

Q. Do you think that that 5/12's alludes to summer months or winter months?

A. I would say it alludes to the summer months.

Q. Well, isn't it a fact that it is the five months of winter that the principal expense is incurred of the overhead, not the summer?

A. I think not.

Q. Isn't it a fact it is all incurred in the winter months?

(Testimony of Marvin Allyn.)

A. I think not. The expense would be incurred during the receiving and grading and handling and shipping of the fresh produce.

Q. Well, when does that commence?

A. These gentlemen would be better able to tell you; I wasn't here.

Q. Anyhow, this is just what somebody told you?

A. That's correct.

Q. But the apportionment to the dairy-creamery unit is based upon the sales of their products in proportion to the total sales? A. That's correct.

Q. In other words, it would be approximately 361,000, disregarding [137] the dollars and cents and hundreds?

A. It would be proportion of sale.

Q. And at this time you don't know what that 12% means? Will you make a note of that and see if you can figure that out? Not now; let it go for the present. A. O.K.

Q. Now, Mr. Allyn, according to your books, and not taking in account the rents received from this apartment down here, there was a loss of $894.48?

A. Something like that.

Q. And that loss includes the loss in the Produce Department of $20,319.12? A. That's right.

Q. And a loss in nearly every other department? For instance, the Trading Post lost $10,000; the garage lost $20,000—this is Page 19—and the hotel and staff houses, $2,116; the Meat Department $13,000; the Produce Department $20,319. Now, the only departments that made profit were the warehouse,

(Testimony of Marvin Allyn.)

$10,315, the community hall and fountain, $1577 and the dairy, $53,793, leaving a net loss of $894. Now, when you apply all those profits to all the losses there is a net loss left of $894. That's right, isn't it?

A. That's right.

Q. That must be true?

A. That is right before the rent figure——

Q. Deduct all the losses from the profits——

A. Yes, that's correct.

Q. Well, it results in a net loss of 894?

A. That is called an operating loss—net loss from operation. [138]

So, in arriving at that figure of a net loss of the whole thing of $894, you have applied the $53,793 net profit from the operations of the dairy-creamery to balance those losses? That is, these books do that?

A. Yes. Or that is the way it was broken down as an explanation of it—we know we had the $894 deficit, and this is the analysis of what caused that.

Q. Yes. Now, if—suppose that the units here that are marked with the red figures which indicate a loss, had come out even, and the others made the profit they did, then there would have been a profit made by the dairy of $53,793, wouldn't there, which didn't have to be applied to cover losses? It has been applied to cover those losses, hasn't it?

A. That's an explanation of the net figure.

Q. Yes. All right, now, here is a total loss, which would be the total of those red figures?

A. That's right.

(Testimony of Marvin Allyn.)

Q. And the profits of the dairy have been applied to cover those losses, haven't they?

A. It appears so.

Q. Can you ascertain between now and tomorrow morning what was paid for eggs, which is included in this cost of goods sold? A. In 1945?

Q. Yes.

The Court: Pardon me. Does your question include both eggs bought in the States and eggs bought in the Matanuska Valley?

Mr. Grigsby: No. Were there any eggs bought in the States? A. Oh, yes, for re-sale. [139]

Q. For re-sale?

A. In our Trading Post, where we might have bought some storage eggs to have two grades of eggs; we may have bought eggs.

The Court: Wait a minute. Didn't you buy eggs to put in your ice cream, too? I understood——

The Witness: No, that is powdered eggs—egg powder.

Mr. Grigsby: These eggs included in the cost of goods sold, refer to eggs that are sold here in the market? A. That is right.

The Court: Eggs produced in the Matanuska Valley, is that what you have reference to?

The Witness: Yes.

Mr. Grigsby: Now, that is charged to the dairy and creamery costs of goods sold. Can you get that amount?

A. I can't promise that. I don't know that these detailed records for 1945 were kept by individuals,

(Testimony of Marvin Allyn.)

and it would be—you would have to go through those books. It may be readily available or it may take compilation to get it. I couldn't say now. We will not be there until evening. Before I get back the clerks will all be gone who are familiar with those '45 records.

Q. Do you know where those eggs are delivered when they are brought to the co-op?

A. They are delivered to the creamery building.

Q. They are delivered to the creamery building, and handled from then on? A. That is right.

Q. And all the cost of that operation is charged under the operations of the dairy-creamery, isn't it?

A. That is right.

Q. And all the cost of operating the creamery, including the cost of everything that they buy down there, is all charged to the creamery and dairy, either as the cost of goods or cost of operation?

A. That's right.

Q. There isn't any way of ascertaining, is there, from any record, what proportion of the cost of goods processed down there was paid to the dairymen here and to the other places that it was bought? They never segregated that, did they?

A. No. Oh, no.

Q. Are you now engaged in creating a system where you can segregate that?

A. We hope to, yes.

Q. You are working on that now, aren't you? That is for the future? A. That's right.

Q. But it has not been done in the past?

(Testimony of Marvin Allyn.)

A. It has not been done.

Q. Now, I want to call your attention to Paragraph (5) which was alluded to in a question put by Mr. Davis:

"The Association agrees to receive, handle by inspecting, assembling, sorting, grading, packing, preserving, canning or otherwise processing, storing, advertising, transporting and other services necessary to prepare for market and sale and to market and resell agricultural products delivered hereunder, together with like products [141] delivered by other members either separately or co-mingled or pooled at its discretion and to pay therefor as set forth in this Contract or cause the same to be done through its Management and Sales Agency."

Now, I understand that this contract that I have in my hand is made with one individual?

A. That's right.

Q. Now, Mr. Davis read to you that portion of Paragraph (7) of this contract under the sub-heading (b)——

A. Excuse me, may I get a copy of that?

Mr. Davis: You may have mine.

Mr. Grigsby: "(b) reasonable charges for the services of receiving, handling and selling said agricultural products under Paragraph 5," which I just read to you, "of this Contract."

This is the question: I call your attention to Paragraph (5) and to this subdivision (b). Now, is it reasonable charge for the services of receiving, handling and selling under Paragraph (5)—is that

(Testimony of Marvin Allyn.)

charge what is expressed by that sum of $83,000, which you have in your books under the heading of operating expense?

A. That is a legal question. I am not prepared to answer that.

Q. Operating expenses of the dairy and creamery, 1945, $83,807.54. Now, does that $83,000 include, according to these books, this audit that you have brought here, does that include [142] the operating expenses of the dairy?

A. I would say so, yes.

Q. Well, does that include the handling of those products that were sold? A. It would.

Q. Now, what you have listed here as indirect overhead is all the other general expenses of the whole co-op outside of what is charged to each unit as operating expenses? A. Yes.

Q. I think that is clear. I think that's all, your Honor.

The Court: Have you any further questions, Mr. Davis?

Mr. Davis: About two, your Honor.

Recross-Examination

By Mr. Davis:

Q. Mr. Allyn, there are, I think, three different, you might say, departments that lost money besides the Produce Department, one of them being the trading post, one of them the garage and one of them the staff houses and the hotel. Now—do the mem-

(Testimony of Marvin Allyn.)

bers of the co-op now use those various facilities that lost money? A. They do.

Q. Do the plaintiffs, themselves, use those facilities? A. They do.

Q. Then if there was a loss it would seem that the plaintiffs themselves incurred part of the loss of those various departments, is that right?

A. In proportion to the amount of business they did with those departments.

Q. Now, have you been able to segregate in any way the amount of those various losses that were incurred by these [143] plaintiffs in those other departments? A. I have notes on that.

Q. Can you get them? (Witness did so.)

A. I have on the basis of the plaintiffs as a group. Will you ask me a question, or what you want?

Q. No, go ahead with what you were saying.

A. I say, I have the proportion of the departmental losses proportioned to the plaintiffs as a group on the basis of the total business that the plaintiffs did with the department in question.

Q. All right, will you go ahead and tell what those figures show?

A. With the trading post and meat department combined, of $23,414.76 loss the plaintiffs represented 6.09% plus, or $1427.85.

Mr. Grigsby: How much?

The Witness: $1427.85. In the garage, 6.72 plus per cent, $1366.66; with the Produce Department, 10.11 plus per cent, or $2,054.77. Those are the losing departments. The warehouse, which showed a

(Testimony of Marvin Allyn.)

profit, the plaintiffs are—represent 17.24 plus per cent, or a profit of $1779.

Mr. Davis: Thank you, Mr. Allyn.

A. That line of figures—that last figure is a profit, not a loss.

Q. Now, I am not certain of the answer to the question I am going to ask. If I am wrong, stop me, but these rents: We had here, now, a net operating loss of the Association of $894 plus for 1945, and then was added the other item of profit from rents that came in, bringing it up to a net profit for the year [144] of something over $2,000. Now, what items are included in those rents? Is that all the Anchorage Dairy rent or are there other rents involved as well, or do you know?

A. There are a total of $576 other than the rent on the Anchorage Dairy included in that figure.

Q. And the Anchorage Dairy makes up the balance?

A. The Anchorage Dairy makes up the balance, or $3207.75.

Q. And that rent, then, from the Anchorage Dairy and the $500 from the others, makes a difference between a loss and a profit on net operations of the co-op for the year 1945, is that correct?

A. That's correct.

Mr. Davis: That is all.

The Court: Wait a minute, Mr. Grigsby may have some questions.

(Testimony of Marvin Allyn.)

Redirect Examination

By Mr. Grigsby:

Q. Mr. Allyn, you have on this statement that you furnished plaintiff's rent from the apartments in the dairy building, $3207. Was that what they received from the Dairy Building?

A. From the apartments.

Q. From the apartments, yes.

A. 3207, I believe that is correct.

Q. Well then, according to that, profits after a net loss of 894, this—the total rents are 3783?

A. That's right. 3200 plus the 500 give you the total rents for the entire operation.

Q. Which leaves a net of 2889?

A. That's correct. [145]

Q. Do you know what that—what was that other rent derived from?

A. It is rent from—$400 is rental income on the garage and $176 rental income to another department.

Q. Community hall?

A. Community hall. That would be rental for our gymnasium and community hall.

Q. But in arriving at the figure, $57,001.58, which is put down here as departmental earnings, net profit of the dairy, that includes the $3207.75 for the Dairy Department only? A. That is true.

Q. The other 500 isn't included in that at all?

A. That is right.

Q. In other words, there is no attempt here to

(Testimony of Marvin Allyn.)

credit the dairy with the rents except from the dairy building?

A. That is correct. Any of these statements are made in good faith.

Mr. Grigsby: I think that's all.

Mr. Davis: That is all, Mr. Allyn.

The Court: Just a minute. I would like to ask a question or two. I suppose, Mr. Allyn, you are not familiar enough with the past history of the Association to determine whether any specific charge was made against the dairy-creamery account of the Association for the purchase of the building, the rents from which are now credited to the dairy-creamery account?

The Witness: There are none whatever. The improvement, the asset—improvement on leasehold as their title, which are the improvements to this building in Anchorage, are carried on the [146] general ledgers as a part of the Association books. They have no connection with the departmentalization whatsoever.

The Court: Then the milk producers in the past didn't put up the money for that investment?

The Witness: Only in proportion as all other members of the Association.

The Court: Have you here, or can you readily obtain without considerable labor, the total amount received from the sale of milk and cream and skimmed milk for the year 1945?

The Witness: Yes.

The Court: That is the milk sold in itself, you

(Testimony of Marvin Allyn.)

may say, in its natural state and not made up into ice cream or other products of that kind.

The Witness: Of the total sales for the dairy-creamery department totaling $361,145.56, the dairy in those items which you mentioned—there again that's separation as determined as fairly and as accurately as possible—$244,290.88, which is 67.644% of the total.

The Court: That is the total of the $361,145.57?

A. Yes, and the other production for the creamery would be the 32.65 per cent which we credited to the creamery.

The Court: Do you know, or can you tell me, what percentage of the milk produced was sold in its natural state as milk or skim milk or cream, and what per cent went into other manufactured products such as ice cream and other things of that nature? [147]

The Witness: A relatively small amount into ice cream. In percentage I couldn't estimate it, but it would be small.

The Court: In other words, more than 90 per cent of the milk produced was sold as milk, skim milk or cream?

The Witness: I would say so.

The Court: Maybe more than 95 per cent? would you be willing to go that far?

The Witness: I couldn't. This is on the basis of the year before I was even here, but I would expect that to be true.

(Testimony of Marvin Allyn.)

The Court: You would expect it to be above 90 per cent, would you?

The Witness: I would, yes.

The Court: Is there any record that would show you that just by casual inspection? Have you any such record that you know of? Is there any such record in your possession, either here or at home? It isn't important enough to make any long search for it.

The Witness: No, it would be a problem of working back the ice cream formula for the total make for the year and estimating.

The Court: And that would take quite a lot of time?

The Witness: That would take considerable time.

The Court: Now, as a matter of human interest, I am wondering why—it may not be important here, but I am wondering why the Meat Department, for example, was operated so as to show a loss of $13,-319.08? Was there any force or power outside of the [148] Association itself which would compel such a loss, and I ask the question because it would seem to me only good sense and good business to charge enough for the product sold or for the meat sold to make the thing come out even—have you any knowledge of that?

The Witness: I have no knowledge of that. That might be answered by someone else who is familiar——

The Court: The same way with the Trading Post, I suppose: It shows a loss of $10,095.68, and

(Testimony of Marvin Allyn.)

yet it would seem to one who doesn't know much about it that the thing should have paid its own way, unless the government kept prices so low—that is, the OPA price control.

The Witness: OPA was effective during those years. That is definitely an influence.

The Court: You do not know whether the loss is attributable to the OPA restrictions or not?

The Witness: I do know that there is a considerable amount of inventory in the Trading Post, particularly, which has been there for some time which was bought before the OPA went on and had not moved and would be caught in the squeeze by OPA. The extent of that influence I wouldn't know, but there's some of those products that were there during those years and are still there.

The Court: Well, I understood the OPA rules when applied to Alaska permitted a mark-up over the cost of the goods sold, whatever that cost might be. [149]

Mr. Grigsby: Your Honor, they did in the grocery I patronized.

The Witness: Well, I don't believe I am competent to answer that question.

The Court: The same way with the garage: You just don't know how it happened they lost $20,000?

The Witness: In the garage I do know that their charges were limited by OPA, that they couldn't increase their—the job cost, whereas their labor cost kept rising until there wasn't enough spread between the labor that was sold and the labor that was pur-

(Testimony of Marvin Allyn.)

chased. The spread just wasn't big enough. But there are others better qualified to answer that than I.

The Court: Well, I presume that there is much less expense in handling and selling milk and cream and skim milk than there would be in manufacturing and selling ice cream and other kindred products.

The Witness: Very definitely.

The Court: I have no further questions.

Mr. Grigsby: I omitted to ask a question. Mr. Davis had you present a paper there showing the percentage of loss of the Meat Department, for instance, which some way you charged to the plaintiffs in this suit. Now, how do you get at that figure? Is that the proportion of their purchases to the whole purchase—to all the purchases?

A. That is correct.

Q. And that loss could be accounted for by the failure to [150] charge enough, or by paying excessive wages? A. Yes.

Q. Or by mismanagement or anything else?

A. Whatever the reason was, yes.

Q. Whatever the reason was, you figure out that each purchaser contributed to that loss by not paying enough to cover it? A. That's right.

Q. And you have charged them with how much in dollars—what percentage?

A. They haven't been charged; this is merely a calculation.

Q. Not charged, but you have calculated them?

(Testimony of Marvin Allyn.)

A. In the Trading Post and Meat combined, 6.09%; Garage, 6.72%; Produce 10.11%.

Q. Now, in computing that did you take the total receipts of the Meat Department from all sources, and then take what the plaintiffs bought and take that proportion? Is that the way you did that?

A. It was based on an analysis of the purchases which was made annually in the office—on the basis of the business with each individual and as to the total business of that department.

Q. The total sales? A. Yes.

Q. And their percentage of the total sales was six per cent? A. That's right.

Q. And does that include sales made to non-members of the Association—anybody that went there to buy? A. That's true.

Q. What is that?

A. It would be on the total sales. [151]

Q. Now, the garage, for instance: I am told 50 per cent of their business is done with people that don't belong to the co-op. That's counted in, though, however, is it, in arriving at six per cent for the plaintiffs? A. Yes.

Q. That includes everything?

A. That includes everything.

Q. The Trading Post and the Meat Department is segregated. What is the Trading Post, other staples—grocery?

A. That is a grocery store, hardware store and dry goods store.

Q. It has everything but meat?

(Testimony of Marvin Allyn.)

A. Yes. And the Meat Department has the wholesale slaughterhouse department and also the retail Meat Department within the Trading Post and it is impossible to separate the two.

The Court: May I ask a question there? In your calculations you have Produce 10.11% and an amount of $2054.77. Will you tell me how that was arrived at?

The Witness: That is, of it 10 per cent of the purchases of produce was purchased from——

The Court: The plaintiffs?

The Witness: Purchased from the plaintiffs.

Mr. Grigsby: That's all.

Mr. Davis: One question, just to clear things up here now.

Recross-Examination

By Mr. Davis:

Q. You say there is a retail Meat Department in the Trading Post? A. That's right. [152]

Q. And when you talk about a loss of the Trading Post, that includes the loss on retail meat, is that correct—if any?

A. No, I think not. This is the year 1945——

Q. Yes. What I am trying to clear up, Mr. Allyn: You have a loss there for the Meat Department. Now, is that the wholesale Meat Department or is that the retail Meat Department that is part of the Trading Post?

The Court: Or is it both?

Mr. Davis: Or is it both?

(Testimony of Marvin Allyn.)

The Court: Or don't you know?

The Witness: I don't know for 1945.

Mr. Davis: Thank you, sir.

Redirect Examination

By Mr. Grigsby:

Q. Does the Meat Department sell meats to anybody at wholesale besides themselves?

A. Oh, yes. They have sold meats in some years, considerable quantities, to the Army.

Q. To the farmers?

Mr. Davis: To the Army, he said.

Mr. Grigsby: Oh, the Army. That's all.

Mr. Davis: That is all.

The Court: That is all, Mr. Allyn. Another witness may be called.

Mr. Grigsby: Mr. Snodgrass.

No. 12544

United States
Court of Appeals
for the Ninth Circuit.

MATANUSKA VALLEY FARMERS COOPERATING ASSOCIATION, a Corporation,

Appellant,

vs.

C. R. MONAGHAN,

Appellee.

Transcript of Record
In Two Volumes

Volume II
(Pages 335 to 604)

**Appeal from the District Court,
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ROLAND SNODGRASS

being first duly sworn, testified for and in behalf of the plaintiff as follows:

Direct Examination

By Mr. Grigsby:

Q. State your name?

A. Roland Snodgrass.

Q. Are you an officer or a member of the Board of Directors of the defendant corporation?

A. I am not at the present time.

Q. Were you at one time? A. Yes.

Q. What year?

A. Well, I was a director from—during 1941, '42——

Q. Just a little louder?

A. I was a director during '41, 1942——

The Court: Mr. Grigsby, if you will stand back there maybe the witness will talk louder.

Mr. Grigsby: That hasn't been my experience, your Honor.

The Court: Let us try it.

The Witness: I was a director during 1941, 1942, 1943—until November, 1944.

Mr. Grigsby: Now, during those years have you been a member of this cooperative association?

A. Yes.

Q. Have you been engaged in business as a dairyman? A. Yes.

(Testimony of Roland Snodgrass.)

Q. Did you sign one of these contracts that is in evidence? A. Yes.

Q. And have you sold milk to the co-op?

A. Every year.

Q. Every year? A. During those years.

Q. Did you ever in any of those years when you sold and delivered milk to the defendant corporation sell it at a fixed price that you were to ultimately get for your milk so sold and delivered?

A. Yes, it is my opinion that I did every year.

Q. What is that? A. I did every year.

Q. At a fixed——? A. At a fixed price.

Q. A fixed final price?

A. In some cases it became final and in some cases it did not become final.

Q. But did you ever agree with the co-op at the beginning of any fiscal year for what ultimate price you would sell your milk—flat figure? Now, that's easy to answer. A. Yes, I did.

Q. All right. Every year?

A. I'll tell you what I did if it will help.

Q. What's that?

A. The first year I agreed to sell at a fixed, flat price.

Q. Then how about the second year?

A. All right, the second year there was no agreement made; they simply raised the price and we went on. There was no new agreement. The first year I agreed to sell at a certain price.

Q. All right, now, haven't you every year, since

(Testimony of Roland Snodgrass.)

'42, delivered your milk and received certain payments upon delivery, or——? A. Yes.

Q. On the total deliveries for each bimonthly period? A. That's right.

Q. And then been paid additional sums for that milk subsequent [155] to the audit?

A. That's right.

Q. That is true, isn't it? A. That is true.

Q. That was true of '44?

A. That was true in '44.

Q. That was true in '43? A. That is right.

Q. And it was true of '42?

A. That's correct.

Q. But in '41 you sold for a fixed, flat price?

A. No, I received an additional payment in 1941.

Q. You got additional payments in '41 also?

A. That's right.

Q. All right, now, in the milk you sold in '45, did you sell your milk for a flat ultimate price?

A. In 1945 I sold no milk.

Q. You were working in the office?

A. That's right.

Q. Did anybody sell any milk at a flat, fixed ultimate price in '45?

A. You mean did they agree to sell it, or did they sell it?

Q. Did they agree to sell it for so much per hundred?

A. There was no agreement that I know of to that effect.

Q. Now, isn't it a fact that they sold it, every

(Testimony of Roland Snodgrass.)

one of them, with an arrangement to be paid according to the terms and conditions of Paragraph (7)?

A. In my opinion the answer has to be "no" because they agreed to sell it in conformance with the terms of the marketing contract.

Q. That is what I am talking about.

A. That is not all the marketing contract—that is Paragraph (7).

Q. All right, what else in the marketing contract could control the price?

A. All right, now, you are speaking of price alone? [156]

Q. Of what they were to get for their milk.

A. All right, Paragraph (8)——

Q. All right, I will read you Paragraph (8):

> "The Association is hereby authorized to process or manufacture into changed or new products the products delivered hereunder and pay the Producer as provided for in Paragraph 7,"

which is the scheme of payment,

> "from the proceeds from resale of the changed or new products or at its discretion to pay a flat delivery price therefor to the Producer as full payment thereof and thereafter process or manufacture it into changed or new products on its own account and at its own expense * * *"

Now, isn't that option to pay a flat delivery price clearly applicable only to goods bought to be re-

(Testimony of Roland Snodgrass.)

processed? Can you put any other construction on it?

A. Yes, I will tell you what my construction of that is.

Q. I would like——

A. Goods to be changed or processed—it uses both words—or manufactured—it uses that word also.

Q. Yes, sir. Well, for instance, milk could set until cream rose to the top and then you would skim the cream off and that would be a change. Is that what you mean?

A. Let's not use that for an example. That isn't what I mean. That could happen. That would be a normal procedure with milk. I would say the milk that [157] is pasteurized is processed — it is a changed product.

Q. And you think that is contemplated by that paragraph?

A. I don't see any reason why not.

Q. Well now, Mr. Snodgrass, where a product goes into a real process, such as making a part of milk into ice cream——

A. That, I believe, is what I mean by manufactured.

Q. Yes, well, that is—processed or manufactured; and where it has to be mixed with other materials, as in the creamery down there, where they buy milk from the farmers for that purpose and have to comingle it with other products purchased from non-

(Testimony of Roland Snodgrass.)

members of the Association, it is quite difficult to apportion, and has been. What proportion of the product goes into the final article, and under those conditions don't you think that Paragraph (8) was put into this contract so as to solve that difficulty? And they say here, your milk is to be mixed with all this other supplies from the Outside, so we will give you a flat price. So, isn't that a common sense interpretation? A. No, not——

Q. You mean, when milk up here is pasteurized —is that——?

A. No, that is a changed product.

Q. Are you perfectly honest about that?

A. I am perfectly honest about that.

Q. However, you never did agree to take a flat price for your milk, at any time for your milk sold in '42, 3 or 4?

A. No such agreement. I made such an agreement to clear the record in [158] 1940 to take a flat price.

Q. For that year? A. For that year.

Q. But you always have received additional payments after the audit?

A. In 1941, 42, 43 and 44.

Q. Yes, sir. And there has always been two per cent deducted?

A. No, I think that has been done since about August, 1943.

Q. All right, since '43 that two per cent has been deducted; and for the year 1944, after they had charged off all the operating expenses and the in-

(Testimony of Roland Snodgrass.)
direct overhead, and had a balance of profit left, you got your proportion of it, didn't you?

A. That's right.

Mr. Grigsby: That's all.

Mr. Davis: Mr. Snodgrass, in addition to being a member of the co-op and a director during the years that you have been——

Mr. Grigsby: If your Honor please, I am informed by my clients that they got home last night after leaving here immediately and didn't get their milking done until after nine o'clock, and up until that time hadn't had time to eat, and had to get up at five o'clock this morning to get back. And I have asked Mr. Davis to conclude by at least half past four, or now, and resume in the morning.

Mr. Davis: That is agreeable to me, your Honor. It seems aparent we can't finish tomorrow.

The Court: No, and we not only can not finish tomorrow, but the [159] Court is bound to leave Sunday morning to hold a term elsewhere, and my present disposition is to adjourn now and continue the case over until the first of April. Now, I know the necessity, or the desirability, of having the matter decided at the earliest possible date, but even if we work until midnight tomorrow night, we will not conclude the case and this is a case of such grave importance that I hope that counsel will give me the benefit of their thoughts on the subject in argument. I do not want counsel to waive argument in this case—it is too important.

Mr. Grigsby: Your Honor, I anticipated that and

(Testimony of Roland Snodgrass.)

I hoped to get the evidence in so that your Honor could review it, but I didn't hope that we could finish the argument, particularly when opposing counsel is Mr. Davis, but I want to——

Mr. Davis: Well, your Honor, since it is 25 after four I think we might as well quit now.

The Court: I think we may as well quit now.

Mr. Grigsby: If your Honor please, I anticipate as long as we can't finish this case it will ultimately be decided just practically as quick if it is adjourned until April 1.

The Court: All right. . . . That will be the order, not hearing any objection, the trial is continued until one o'clock on April 1, 1947; and if counsel have any lists of adjudicated cases which bear upon the question, I should be glad to have them submit those lists now—not briefs or arguments, but simply lists of, perhaps, similar cases that have been decided [160] by other courts.

Mr. Grigsby: There never has been, your Honor.

Mr. Davis: I have been unable to find any case directly in point. On the other hand, I have two books on co-op law which have been furnished me, and if you like I will be glad to turn it over.

The Court: You had beter keep it because if I use them I will have to take them to Cordova.

Mr. Davis: I don't think I will need them.

The Court: Very well, I will be glad to take them and read them during the sessions at Cordova and Seward.

Mr. Davis: Your Honor, Mr. Stock has just in-

(Testimony of Roland Snodgrass.)

formed me he is going Outside next week and he might not be back April 1. Now, in the event he should not get back, we would like to ask for a continuance because from our standpoint he is a very important witness. He will try to get back April 1, but in the event he isn't, we would like to continue the case.

The Court: He will not be gone much longer than that?

Mr. Davis: He intends to be back April 1.

Mr. Grigsby: Maybe a day or two?

Mr. Davis: Yes, if he can't get back, maybe a week— not longer than a week.

(At 4:30 o'clock, p.m., trial of the cause was continued until April 1, 1947.)

(On Tuesday, April 1, 1947, the matter was again continued [161] and on Monday, April 7, 1947, the following further proceedings were had, at 10:00 o'clock, a.m.)

The Court: Do counsel wish to have this trial suspended at four o'clock this afternoon?

Mr. Grigsby: What was your Honor's statement?

The Court: On the former days when testimony was taken in this case, we suspended before five o'clock. Is it the desire of counsel today to suspend at four or 4:30?

Mr. Grigsby: Yes, your Honor, as soon as possible.

(Testimony of Roland Snodgrass.)

The Court: At four o'clock?

Mr. Grigsby: Yes, at four o'clock.

The Court: Very well, I wish to know at this time because there may be something else to take up.

This is a continuation of the trial of C. R. Monaghan against Matanuska Valley Farmers Cooperating Association. You may call a witness, Mr. Grigsby.

Mr. Grigsby: Will the stenographer——

Mr. Davis: I had not cross-examined Mr. Snodgrass.

The Court: You may proceed, Mr. Davis.

Mr. Grigsby: I don't remember exactly where I left off, but you can proceed with cross-examination. It might suggest something to me.

Mr. Davis: It probably will.

Cross-Examination

By Mr. Davis: [162]

Q. Now, Mr. Snodgrass, to try to kind of get in mind what we were talking about when we quit at the time the trial was suspended, when was it that you became a member of the Matanuska Valley Farmers Cooperating Association?

A. I believe it was in 1937.

Q. And have you been a member ever since that time?

A. Well, I was suspended for a little over a year during which time I wasn't producing agricultural products.

(Testimony of Roland Snodgrass.)

Q. And was that during part of the time when you were manager? A. Yes.

Q. And during what period were you manager of the Matanuska Valley Farmers Cooperating Association?

A. I believe it was from approximately January, 1944, until February 5, 1946.

Q. From January '44 until February '46?

A. I believe so, yes.

Q. Now, were you a director of the Association prior to the time that you became manager?

A. I had been a director for approximately three years.

Q. And when did you begin, do you remember?

A. As director?

Q. Yes.

A. Well, I think—I couldn't be too sure, but I believe it was in the early part of the year 1941.

Q. And how long, then, did you continue as director? A. Well, until January, 1944.

Q. At the time you took over as manager?

A. Yes.

Q. Now, were you the general manager of the co-op?

A. I [163] believe—yes, that was the title.

Q. Under the direction and supervision of the Board of Directors? A. That is right.

Q. Who was the manager that proceeded you?

A. Mr. L. C. Stock.

Q. And who is the manager that succeeded you?

A. E. E. Harris.

(Testimony of Roland Snodgrass.)

Q. And is Mr. Harris still the general manager?

A. No, Mr. Harris has not been manager for a matter of a few months.

Q. Who is the present general manager?

A. At the present time there is no general manager. They have Mr. Eckert, I believe, as acting manager.

Q. And Mr. Eckert is a member of the Board at this time, is he? A. Yes.

Q. Now, Mr. Snodgrass, I think you told Mr. Grigsby that you are in business as a dairyman?

A. Yes.

Q. Are you one of the larger dairymen?

A. Yes, slightly above average, anyhow. I have in some years been the largest.

Q. Now, during the time when your membership was suspended by reason of the fact that you were the general manager, what became of your dairy herd during that time?

A. My father ran the place for those two years.

Q. And does that include the time in question here, 1945? A. Yes.

Q. Your father, then, was managing your herd in 1945? A. That's [164] right.

Q. Have you made any study, Mr. Snodgrass, as to the percentage of the consumer's dollar that goes to the milk producers under the payment which is made by the co-op? When I say payment, now, I am talking about the payment that is made every month, leaving out of consideration any overages that might

(Testimony of Roland Snodgrass.)

be paid at the end of a year. Have you made such a study?

A. I have never made a very thorough study of that except to note—except that each year I would compare to see approximately what percentage of the consumer's dollar was being paid to the dairymen, the consumer's dollar being the retail price of the milk—not what the Association receives for it.

Q. Now, do you know—do you have a pretty fair idea of what percentage of the consumer's dollar the milk producer has received—with the exception of the years 1940 and 1941—of the first advance payment, so that we won't have to argue about that?

A. It has been approximately 50% of the consumer's dollar.

Q. And if further payments were made later in the year or at the end of the year, would that increase that percentage?

A. Yes, it has increased it up over 60% in some years.

Q. You say, then, that over all the years, since 1940 or '41, it has been approximately 50%?

A. Yes. In 1940 it was—it ranged from 35 to 44 per cent.

The Court: What year was that?

The Witness: In 1940. And after 1940—I believe in 1941— [165] from that time on it has been approximately 50 per cent.

Mr. Davis: And that is the advance payment—the advance or the first payment or whatever it may be called that you figured that percentage on?

(Testimony of Roland Snodgrass.)

A. Yes.

Q. And if further payments are made later in the year that percentage increases?

A. That is right.

Q. Later in the year or at the end of the year or whatever the procedure may be? A. Yes.

Q. Now, Mr. Snodgrass, are you pretty well familiar with the operation of co-ops in other places?

A. I wouldn't consider myself very familiar with cooperatives in other places. I have not belonged to them nor been there to study them.

Q. Have you made a study of the percentage of the consumer's dollar that milk producers receive under other co-ops?

A. No, I have very few figures under other co-op setups. The only ones I have are just like the milk market magazines or national markets as a whole.

Q. Well now, have you made a study of those—milk market magazines and that sort of thing?

A. Out of curiosity I have for several years noted all the statistics I would see on that.

Q. And have you done any figuring as to what percentage of the consumer's dollar goes to milk farmers in other places?

A. Well, I have counted instances in text books and occasionally in magazines showing that the range has run from in the low 40's up to around 60 per cent, and in cases of some extremes they may run [166] up higher. I haven't seen those extremes. The average appears to be about 50 per cent.

Q. Now, Mr. Snodgrass, as a member and as a

(Testimony of Roland Snodgrass.)

director and as a manager for part of the time, of the co-op, are you familiar with the way the co-op was run—with the way the payment for the milk was handled over the various years? A. Yes.

Q. Will you tell the Court, if you know, how the milk men were paid in the year 1945—the year ending November 1, I believe it was, 1945?

A. There is somewhere here a schedule which shows the payment.

Mr. Grigsby: Little louder?

The Witness: I say, there is somewhere here a schedule showing the payments as they were made. I don't have a copy of it with me, but in 1945——

Mr. Davis: New excuse me: Let me get that Exhibit No. 3, I think it is. Handing you Defendant's Exhibit No. 4, is that the schedule you were talking about?

A. Yes, this is the schedule here. In 1945, there were three changes in the price of mik. You see, we have a base price on four per cent butterfat milk. It will be so many dollars a hundred and then there is what is sometimes called the buterfat differential, which is the increase or decrease from that price based upon the test of milk—the increase and the decrease over or below four per cent. The base price in four per cent milk was in April 22—no, I beg your pardon, August 1, 1945—excuse me, may I change the date? From [167] April 22, 1943, until August 1, 1945, which takes in eight months of '45, it was $6.70 per hundred pounds of four per cent milk; and for each tenth of a per cent above or be-

(Testimony of Roland Snodgrass.)

low four per cent there was a differential in that price of six cents. In other words——

Q. Six cents per what?

A. Per hundred pounds. And then on the same system, the base price on September 1 was increased to $7.20, but the butterfat differential of six cents per hundred pounds for each tenth of a per cent butterfat above or below four per cent remained the same; and again on September 16, the base price was increased to $7.70 with the same butterfat differential.

Q. Now, then, Mr. Snodgrass, were further payments then made to the milk farmers?

A. In 1945—that is what we are arguing about—there were no further payments after the payments as indicated here, which were made twice a month.

Q. All right, now, leaving out the word "payment," did the milk farmers receive additional money for their milk they delivered during the year 1945?

A. No, they did not—just these amounts per hundred pounds of milk.

Q. Now then, going back to the year 1944, was the milk handled the same way in 1944 as it was in 1945?

A. Well now, the handling of the milk, I believe, was pretty much the same.

Q. By "handling" I mean the way the price was figured and all that sort of thing.

A. Well, in 1944, of course, during the [168] entire year the price on milk was—this is to keep out

(Testimony of Roland Snodgrass.)

of that argument—this was the first advance or the price, $6.20 per hundred of four per cent milk.

Q. Now, at the end, or after the end of 1944—of fiscal 1944—were additional payments made to the milk farmers?

A. There were two additional payments: Both—one, I believe, 20 per cent of the amount previously received, and the other 20 and some fraction of a per cent—23 per cent perhaps.

Q. Now, can you tell the Court how those figures were arrived at?

A. Well, at the end of the fiscal year 1944, we had a profit—that is, the Association as a whole had a profit——

Mr. Grigsby: I can't hear the witness.

The Witness: At the end of the fiscal year 1944, the Association as a whole had a considerable profit.

The Court: Pardon me. Will you speak a little louder? It is hard for me to hear also.

The Witness: At the end of fiscal year 1944, the Association had a considerable profit. This profit was in the accounting procedure broken down to appear that some of what are called "departments" showed a profit and some showed a loss. The creamery was among those showing a high profit. In the distribution of the income of the Association, it was—the attempt is always made to prorate that back to the producers or the consumers in whose department this profit has been made. In other words, if we have a profit we try to put it back—we show, I [169]—well, as it was at the time where I had part to do

(Testimony of Roland Snodgrass.)

with it—at the end of the year, as I said, we had a profit. Among the profit-making units was the combined dairy and creamery. So, whatever percentage of the profit of the Association was made by the combined dairy and creamery, was distributed to the patrons who had earned it on the basis of—well, we say of their patronage: In this case, on the basis of what they had contributed to that profit.

Q. All right, and that turned out to be 20 per cent on one payment and 20 some odd on another?

A. That is right.

Q. To the milk producers? A. Uh-huh.

Q. Now, Mr. Snodgrass, were the mechanics any different—the mechanics of distribution of the money, any different in the year 1945 from 1944?

A. Well, they would be different inasmuch as they haven't been completed, if they were to be completed on the same basis. First, in 1944, the profit of the Association was some—well, there was approximately $60,000. In 1945, the profit of the Association was 2800 and some odd dollars. Now, by all previous custom the Board of Directors would figure what percentage of that 2800 had been contributed by the dairy and creamery and then distribute that among the patrons who brought in milk, that is, they would distribute that proportion which their breakdown showed to have been earned on milk. Now, that part hasn't been done and, of course, there is the only difference between the two years so far, except the net [170] amounts are also greatly different.

(Testimony of Roland Snodgrass.)

Q. The big difference, of course, is that in 1944, the Association made a substantial profit and in 1945, it didn't make a substantial profit?

A. That is the big difference.

Q. Now, in the year 1944, Mr. Snodgrass, did all of the so-called departments or units make money?

A. No, there has never been such a year. All of them didn't make money. Those which lost money didn't lose as much as they did in 1945.

Q. Now, how were the shortages made up in the year 1944, on the departments that didn't make money?

A. Well, in the first place, of course—it is almost necessary to use comparison in that case, but I will try to answer. When the profit and loss statement of the Association is made, it shows so many dollars were made——

Mr. Grigsby: Just a minute——

The Court: Just a minute. Mr. Grigsby is still unable to hear you. If you can talk louder it will be a help. Suppose you talk to the rear row back there.

The Witness: Would you repeat the question, please?

Mr. Davis: I think you were talking, Mr. Snodgrass, on how shortages in some departments were covered in the year 1944.

A. Well, in the process of performing the audit of the Association the auditor will generally first come out with the net profit or loss of the Association. When he does, the Association knows it has a certain profit which has been made, or a certain loss

(Testimony of Roland Snodgrass.)

which [171] has been made. Then the auditor will break down the operations somewhat arbitrarily, however, as exactly as he can, into departments, which is in its way a cost accounting procedure, and it will develop that some departments have made money and some have lost money. However, the amount which the Association has made or lost is the one fixed amount and it would have to be assumed that if the Association has made, say, $5,000, to be quite arbitrary, and one department has made $10,000, and another has lost $5,000, that the department which made the $10,000 would subsidize or support the losing department. Now, that—of course, this breakdown in departments is an arbitrary thing in itself. It is a cost accounting procedure. In fact, it isn't even a cost accounting procedure; it is simply an analysis for the Board and the manager to see which departments are performing satisfactorily and which are not. But the breakdown comes after the general profit and loss statement for the Association is made.

Q. Now, Mr. Snodgrass, was the same procedure used in, for instance, the year 1944 and 1945, at arriving at that figure that you have been talking about?

A. So far as I know the same procedure was used. The same auditor was employed and, I believe —I have no reason to believe that there was any difference in the procedure.

Q. The difference, then, arises in results rather than the procedure? A. That is right. [172]

(Testimony of Roland Snodgrass.)

Q. The fact that the Association didn't make as much money in 1945 as it did in '44?

A. That is correct.

Q. You were a member of the co-op, I presume, at the time that the co-op took over the buildings and the businesses that had been previously handled by the ARRC?

A. I was a member of the Association, not of the Board, at that time.

Q. Can you give the Court a little bit of background there as to how that was set up to begin with and why you took over the various functions of the ARRC?

A. Well, I can give you my opinion of it. Anyhow, on January 11, 1940—I may tangle myself up badly on this because it is very complicated thing and no one has ever gotten it very straight.

Mr. Grigsby: We object to all this as not within the issues of the case. It has nothing to do with the interpretation of that contract.

Mr. Davis: Your Honor, I figured it might be helpful to your Honor in determining what is to be done about their contract.

The Court: I will hear it; objection is overruled. I don't know that it will be considered in making a decision. You may proceed.

The Witness: Now remember, I was not actively engaged in the operation of the affairs of the Association. I was a member at that time, but not of the Board. On January 11, 1940, the Association purchased from the Alaska Rural Rehabilitation

(Testimony of Roland Snodgrass.)

Corporation the physical plant at Palmer. That included the buildings, [173] the land and the inventories in the different businesses. The reason that that was done was because the Corporation had stated that they could no longer finance the operation of that part of the plant which was intended to be the cooperative setup.

Mr. Davis: To keep the record straight, who do you mean by "the Corporation"?

A. The Alaska Aural Rehabilitation Corporation.

Q. And it is a general distinction in the valley, isn't it, the Corporation being the ARRC and the Co-op being the Matanuska Valley Farmers Cooperating Association?

A. They are now very distinct.

Q. Yes. Go ahead.

A. Well, at the time this was made there were a number of the directors of the Association were against taking it over because of the fact that it appeared to be a losing business and it wasn't felt that the income necessary to carry on this operation could be taken from the farmers. There was actually almost no alternative, or there was no conceivable alternative to taking it over because the Corporation—the Alaska Rural Rehabilitation Corporation—said they could no longer finance it. Some businesses were making a profit. At that time I believe it was the garage, the Trading Post and possibly, the warehouse, and all other so-called departments were losing money. After that had hap-

(Testimony of Roland Snodgrass.)

pened—well, perhaps simultaneously with that, the Farm Security Administration—the present Farm Home Administration—loaned the Association $300,000 with which it first bought the stock in trade, the inventories and the different businesses from the Corporation. For the physical plant, that is the land and the buildings as separate from the inventories and trade, the Corporation accepted the note of the Association for $200,000; and from that time on the Association operated the business as a cooperative. Its first major step, probably, was in starting to enlarge the creamery and dairy by buying cottage cheese making and ice cream making equipment. In the year—about the middle of the year 1940 the Association bought out the East Side Dairy in Anchorage and started in the market milk business in Anchorage.

Mf. Grigsby: What year?

The Witness: 1940. For the first—well, this is going backwards a little. As I said, this is rather confusing, but in the first three months of operation was on a sort of probational agreement to see if the Association could successfully operate the affairs of the Association, and so it at first turned over to the Association, under the management of Mr. Stock, the three units handling farmers' produce, the Meat Department, the dairy and creamery, or at that time it was only creamery, and the Produce Department, handling vegetables. And the Corporation offered—well it did, actually, to pay $7,000 a month to the cooperative to take care of

(Testimony of Roland Snodgrass.)

the cash deficit which would occur based upon their experience in operating those three units. At the end of the—that is, that cash deficit was their estimate based upon their previous operation, and they paid that to the Association. At the end of, I believe, three months—although I am not too certain—there was considerable amount of that was refunded to the Corporation. It was not used. Then during the next few months one unit or two units at a time were turned over to the operation of the Association, and then on January—that was during the year 1939—on January 11, 1940, the Association took over the operation of the entire Civic Center or Cooperative setup there at Palmer.

Now, from that time on, it maintained approximately the same bookkeeping system as the Corporation had originally, and it has with the exception of having closed out two units, the cannery and the power house—the cannery is closed and the power house is no longer maintained as a unit, but simply as the cost of heating and lighting the plant—it has maintained approximately the same bookkeeping system, which gives first the profit and loss of the Association and then the breakdown into departments to see where the operation is satisfactory or where it is not satisfactory.

Mr. Davis: Now, Mr. Snodgrass, you mentioned a note of $200,000 to the ARRC given by the Association or the co-op?

A. That is right.

Q. Do you know as to whether or not any means

(Testimony of Roland Snodgrass.)

have been taken toward retiring that note?

A. To the best of my knowledge, [176] there has not been a reserve set up for that note. Its due date is not for 20-some years yet. The Association does not have a reserve set up for the retirement of that note. The only provisions are in the distribution of profits of the Association as it has not distributed in cash any profits on consumer units earned since the year 1938. In place of that it has issued notes to the patrons of the Association and the consumer units with a due date of 10 years, I believe, which tend to build up the—well, it tends to build up the ratio of current assets to current indebtedness and by maintaining a rather high ratio of current assets to current indebtedness there is, figuratively, room for a reserve, or that takes the place of a reserve to retire the Farm Security note. However—or not the Farm Security note—the Corporation note.

Q. The Farm Security note, Mr. Snodgrass, is being paid so much each year?

A. That is right. It is being paid. But this—the notes which appear in the hands of the patrons of the Association deferring that payment gives the Association, possibly—it is a questionable point—it gives the Association the wherewithal ultimately to pay off the Farm Security note. However—

The Court: Not the Farm Security——

The Witness: No, I beg your pardon, the Corporation note. Now, there is one big difference that would be made if a reserve were set up. If a reserve were set up, it would reduce the shown profits by some $6,000 a year, and I believe if it has ever

(Testimony of Roland Snodgrass.)

been thoroughly hashed out—which I somehow doubt—the Association would follow the auditor's suggestion on the matter, but if it has been discussed with the auditor, I believe the Association has preferred to postpone the establishment of that reserve and then accumulate the reserve at a faster rate so that during the time that the project is growing and getting on an economic basis larger returns can be made to the patrons in the early years.

Mr. Davis: Now, did you say during the time the ARRC was operating this project that there were losses in several of these departments?

A. Well, on the basis of the figures accumulated for the payment of dividends—the dividends accumulated appeared from the Trading Post, the garage, during one or perhaps two years, the warehouse and then the rentals of the barber shop and the laundry—I believe on that basis—I haven't seen their books, but on that basis, since there were no profiits accumulated and no profits paid from the other units, the other units must have been been running in the red. I know for sure Produce, the creamery and Meat Department were running in the red because they said so when they offered to pay the expected losses on those departments at the rate of $7,000 a month.

Q. In looking over this standard contract between the cooperative Association and the growers, I notice it is provided [178] in there that there shall be a management and sales agency of the co-op. Can you tell the Court who was contem-

(Testimony of Roland Snodgrass.)

plated to be the management and sales agency at the time this contract was drawn?

A. Well, the management and sales agency was the term given to the Alaska Rural Rehabilitation Corporation in a contract which the Association made when it was first incorporated. It simply, at the time it was incorporated, entered into an agreement with the Alaska Rural Rehabilitation Corporation by which that Corporation became its management and sales agency.

Q. And when the thing is mentioned in the contract you are talking about the ARRC?

A. That is correct. Now, that was correct up until January 11, 1940, at which time that agreement was terminated.

Q. And at that time, then, the co-op became its own management and sales agency?

A. That is right.

Q. Now, Mr. Snodgrass, at the end of the year, if the co-op had shown a profit, as you have testified to here, dividends were declared to the producers according to the goods they had produced, if I understood you correctly?

A. Well, if the Association had a profit.

Mr. Grigsby: We object to the question as leading—putting word "dividends" into the witness's mouth.

The Court: Overruled. You may answer.

The Witness: It has been the custom of the Association, if it had a profit at the end of its year's operation, to seek to find [179] which class of pro-

(Testimony of Roland Snodgrass.)

ducers or consumers, or which classes of producers or consumers contributed to that profit, and then as best possible, to pay them either in cash or in notes or certificates of equity, the amounts earned on their business. There has been a second policy corollary on that, which has been as follows: The profits earned on consumer goods, or in the consumer units—the warehouse, the garage and the Trading Post—have been set up on 10-year certificates of equity or notes of the Association. The profits earned on farm products have been paid back in cash at the end of each year with, of course, the exception of 1945 which is in dispute.

Q. Now, when you talk about profits, is that the profit of any one unit or the profit of the Association you are talking about?

A. No, it is the profit of the Association which is distributed in that manner.

Q. As a whole?

A. And the part which the unit profit plays is in the distribution: it is necessary to find which class of consumers or producers have contributed to that profit of the Association.

The Court: May I intervene there? I didn't understand, or I do not understand, one thing which you mention in your testimony as to certificates, apparently, that were certificates of indebtedness, I assume, that were given by the cooperating association to certain consumers or certain producers. Will you explain that? [180]

(Testimony of Roland Snodgrass.)

The Witness: Well, we have two classes of certificates of indebtedness or certificates of equity which the Association issues. I will have to make it as two illustrations. One is this: With regard to that two percent of the gross sales price which the Association can deduct from the payments for farmers' produce, the Association has issued certificates of indebtedness which is a provision to pay that back after a stated time; and with the second illustration—would be that should it be found that the Trading Post, or the warehouse, had contributed to the profit of the Association as a whole, the amount of $10,000, then the Association would determine what percentage of that profit had been made on the business of each member. That is a requirement by law, so that it can provide for the repayment of that profit to that member. Now, the necessity for repayment of the profit on the consumer business is not pressed.

The Court: It is what?

The Witness: It isn't pressing. The law doesn't say we have to pay it back at the end of the year or at any time. We simply must make the provision to pay it back. So the Association has done this: Inasmuch as it has a total indebtedness of something less than $500,000, it has issued certificates of equity for the profits on their consumer units.

Mr. Davis: Explain to the Court what you mean by consumer units.

A. Well, the consumer units are the warehouse,

(Testimony of Roland Snodgrass.)

Trading Post, garage, or any unit which buys from some source other than [181] the farmers for resale to the farmers as consumers.

The Court: What about this Meat Department, is that a consumer unit?

The Witness: The Meat Department has at times been operated as a producer and consumer unit, and it has been operated at times as two departments—a retail and wholesale meat, as we call it—wholesale, buying from any source, and selling to the consumer. The retail would be a consumer unit; and the wholesale unit is one that buys from the farmers and sells to other persons—to the retail department or the restaurant or to the general public.

The Court: I think I understand.

Mr. Davis: And when you talk about consumer units—I think you said consumer units—the profits had been distributed in the form of certificates of equity? A. Yes.

Q. And the producer units, as distinguished from the consumer units, the profit has been distributed in money?

A. The profit has been distributed in money, that is right.

Q. Now, then, to go back to my original question here: In the past has the profit that has been distributed been the profit of any particular department or the profit of the Association as a whole?

(Testimony of Roland Snodgrass.)

A. Well, any profits which have ever been distributed are the profits of the Association as a whole. There has never——

Q. There never—— [182]

The Court: You interrupted the witness, Mr. Davis. Had you finished?

The Witness: No, he started another question.

Mr. Davis: Well, you distributed the profits of the Association on the basis of the goods which the producer has turned over to the Association, is that correct?

Mr. Grigsby: Objected to as leading and already answered. It has already been stated.

Mr. Davis: This is Mr. Grigsby's witness, not mine.

Mr. Grigsby: All right; withdraw the objection.

The Court: I think he is as much witness for one party as he is for the other.

Mr. Davis: I will agree to that.

The Court: I think the witness has already answered, but if he cares to make further explanation he may.

Mr. Davis: Withdraw the question. To your knowledge, so far as you know, Mr. Snodgrass, are there any funds of the Association from which these milk producers might be paid additional money for 1945?

Mr. Grigsby: Objected to as immaterial, whether the Association can pay or not.

The Court: Overruled.

The Witness: Well, may I ask what you mean

(Testimony of Roland Snodgrass.)

by funds? Theoretically, of course, the Association could liquidate inventory and pay them in cash.

Mr. Davis: Well, possibly I should say "reserve" rather than liquidate——

A. As far as reserves are concerned, I have no idea where it would come from.

Q. Looking over the balance sheet, the profit and loss statement for the year 1945, I have seen an item in there of United States Government Bonds to the tune of several thousand dollars. Do you know whether or not those bonds would be available for payment to these farmers, or are they obligated somewhere else?

Mr. Grigsby: We object to it, if the Court please. This isn't supplementary to execution or anything of that kind. It has nothing to do with the merits of this case, as to whether they owe these plaintiffs or not, what they are going to pay it with.

The Court: Overruled. You may answer.

The Witness: So far as I know, the bonds could not be used for that purpose inasmuch as they were not borrowed—the money was borrowed from the Farm Security for certain purposes, all of which were subsequent development of the plant or new units which would have to be built to accommodate either—well, for instance, they could be used for the development of a cold storage plant; they can be used for new processing equipment or plant, but not for operating expenses.

Mr. Davis: Now, I have particular reference,

(Testimony of Roland Snodgrass.)

Mr. Snodgrass, to some United States Government Bonds that I think are shown [184] as an asset.

A. That is right.

Q. Now——

A. You see, here is the point with those bonds: When the Farm Security loan was made it was made for certain specific purposes.

Q. Yes?

A. It ran for three years with the provision in there—I believe it was three years—that any part not drawn at the end of three years would revert to the government. Now, among those specific purposes for which that money could be drawn, was this one thing—was indefinite—it could be drawn for whatever additional capital investment we might have to make to handle the business of the farmers, either as producers or consumers, without being specific. In other words, it could be used to enlarge the creamery, to enlarge the cannery or to construct a cold storage plant, but specifically for none of those, just for something of that type. As the expiration date of this loan approached the Board made application to withdraw that money from the hands of the Treasury and put it into bonds so that it could be held to be used for the same purposes if such an emergency should occur, or if such an opportunity should occur. And it has been held for that purpose, which is—well, it is being held for the purpose for which it was originally borrowed.

(Testimony of Roland Snodgrass.)

Mr. Davis: Thank you, Mr. Snodgrass, that is all.

The Court: Any further direct?

Mr. Grigsby: Yes, your Honor. [185]

Redirect Examination

By Mr. Grigsby:

Q. Mr. Snodgrass: Now, you say that when the defendant Corporation, this Matanuska Valley Farmers Association, incorporated—was organized —what year was it organized?

A. Well, I believe it was organized in 1936, in the fall—November.

Q. And they took over the system of bookkeeping of the Alaska Rural Rehabilitation Corporation—they just kept on keeping the books the same way? Didn't you so testify?

A. I believe that the general principle of the bookkeeping is very much the same.

Q. And that was before this marketing contract was invented?

A. Well, that's quite a question. I couldn't answer that. The marketing contract existed in 1936.

Q. What did you say?

A. The marketing contract existed, of course, when the co-op was incorporated in 1936. In 1935 when the Corporation first started there was not enough farming so they had any system of bookkeeping which operated a business in farm produce. In other words, the incorporations were so closely

(Testimony of Roland Snodgrass.)

simultaneous—the operation of a Produce Department and the store and a garage and a creamery all came into existence about the same time as the Association was incorporated.

Q. All right, now. Anyway, you, generally speaking, adopted the system of bookkeeping that was maintained by the Alaska Rural Rehabilitation Corporation?

A. Yes, under its agency agreement. [186] Of course, they had other operations not in that system.

Q. Now, what do you mean by the consumer's dollar?

A. It's your 35c if you buy a quart of milk—or your 30c or 25c, depending on what the price was at the time you bought it.

Q. For instance, if it is 40c now, including the bottle, that's the consumer's dollar?

A. Yes, except the bottle wouldn't be included in the consumer's dollar on milk.

Q. All right now, when you paid these dairymen off in additional payments in 1945 for their business of 1944—there are some slips in evidence here where it says 20 per cent—that's 20 per cent of what?

A. That is 20 per cent of the amount he had received during the year, 1944, for that product.

Q. You took 20 per cent of the cash he had received? A. That is right.

Q. Now, how did you arrive at that? As you

(Testimony of Roland Snodgrass.)

said, there in '45 they got a payment of 20 per cent and then one of 20 and a quarter?

A. 22, or something like that.

Q. How was that arrived at? A. Well——

Q. At that time had you figured out what the net profit on the milk sales would be, approximately?

A. The whole chain of reasoning would go as follows: The Association as a whole has so many dollars which are shown as profit by the auditor. Then the auditor will be asked to break that down to find out what class of consumers or producers that came from. Well, he finds that it came—a large amount came from the creamery and dairy. That is before we break it down into milk and other products. A certain amount may have come from the Trading Post or the warehouse. Now, those component amounts—not necessarily the net profits on the units as shown by his audit, but the percentage of the total net profits of the Association—is found from this breakdown to have come from various classes of consumers and producers. Then, since you want to be specific on milk, there is found to be a certain percentage of the total net profits came from the operation of the creamery and dairy. Now, that is further broken down—I think perhaps Mr. Allyn, if you put him back on, has a breakdown on that—that has been broken down in two or three years, I believe, to distinguish as nearly as possible what profits have been made upon the products received from the farmers

(Testimony of Roland Snodgrass.)

and what profits have been made upon the operation of something like ice cream—or the manufacture of something like ice cream or popcicles or any of the frozen confections in which the greatest percentage of the material going into it is shipped in.

Q. And have they finally broken down and discovered what that product is? Ice cream mix, for instance: Have you it broken down so you know your profit in '45 on ice cream mix?

A. I don't believe it has gone that far, not for determining the profit on ice cream mix, but to split the creamery, or manufactured products, from the products which had as their basis milk, or milk and eggs. [188]

Q. All right. Now, we are getting off the question. Now, you say that the Association found themselves at the end of a season with a profit on all operations, and then you would seek to find out where that profit came from and break it down?

A. That is correct.

Q. And you would find that most of it, for instance, came from the dairy and creamery?

A. That is right.

Q. Well now, haven't you got that absolutely reversed? You keep track of the dairy and creamery unit during the season, don't you? A. No.

Q. To keep track of what you pay the dairymen for their milk?

A. Oh, I beg your pardon, yes—all the figures——

Q. Now, wait a minute—and you keep track of

(Testimony of Roland Snodgrass.)

what it costs to handle that milk as you go along and what you get for it, and then in the wind-up you find out that the dairy-creamery has made $57,000 and that the farmers have lost $21,000, and you have got your breakdown first?

A. No, you don't.

Q. And then you found your net afterwards?

A. No, you are quite wrong about that.

Q. All right, then, you find yourself with some money on hand. You don't know where it came from or who to attribute it to, and then you break it down to discover it?

A. Well——

Q. Answer the question: Is that what you do?

A. No, that isn't what you do.

Q. Well, why don't you say—well, I will ask you this [189] question, Mr. Snodgrass: Now, in 1940, I believe you first started milk deliveries in Anchorage? A. That is right.

Q. And from that time—from 1940—and up until date you have never purchased milk from the dairymen at a flat price, have you?

A. Well, are we going to argue about that again?

Q. No, we are not going to argue about it. I am asking you. Now, you have told me out in the hall three or four times, haven't you, Mr. Snodgrass, that you are——

Mr. Davis: He testified for Mr. Grigsby the other day they did purchase it at a flat price at one time. Mr. Grigsby is not entitled at this time to cross-examine his own witness.

(Testimony of Roland Snodgrass.)

Mr. Grigsby: Well, I think I have——

The Court: Well, if counsel wants to try to prove that the witness on some other occasion gave testimony not in harmony with that given on the witness stand, the law permits that.

Mr. Grigsby: Now, you were on the stand the other day. Before you went on the stand you told me in the library that since 1940 the co-op had never paid the dairymen a flat price for their milk and that you had so testified—did you not so state?

A. Well, I will tell you, Mr. Grigsby——

Q. Well, did you not so state?

A. I couldn't even recall.

Q. All right. Then, after you were on the stand, and you wouldn't come out and swear to that, did you not explain to Mr. McAllister and Mr. Monaghan it was because I wouldn't ask you the right questions? A. No, that was about—— [190]

Q. You didn't say that?

A. That was about pools.

Q. All right, then. Now, you didn't so state? Now, I am asking you if from the time the co-op started delivering milk in Anchorage and selling it here, on any scale to amount to anything, in 1940, has the co-op ever purchased milk from the dairymen at a flat, fixed, final price?

A. No. Now, we are getting where we can make sense. As I said, the last time you asked me, I sold milk at a flat price in 1940 because there wasn't any suggestion of anything more or anything less—in 1940. Now, you asked me things about

(Testimony of Roland Snodgrass.)

flat price and so on, but when you use the word "final" I can say no——

Q. All right. Since 1940 you always have made the farmers additional payments after the close of the fiscal year?

A. That is correct, yes.

Q. For their milk? A. That is right.

Q. And have you not, then, paid the farmers, ever since 1940, according to the provisions of Paragraph (7) of this contract?

A. Just as closely as we could.

Q. That is what you have tried to follow?

A. That is what we have tried to follow.

Q. Then when you talk about finding yourselves with a profit at the end of the year and trying to redistribute that back to the people that contributed to it the most, you mean that you paid back the men that appear to have made a profit according to the profit they made? Is that really what you mean? [191] Isn't it?

A. According to the profit the Association has made.

Q. According to the profit the unit—the dairy-creamery unit made, you fixed the final price of their milk?

A. No, according to that percentage of profit which that unit bore to the total profits.

Q. But you just stated you paid them off according to that Paragraph (7) as nearly as you could?

A. As near as we could and that was a considerable difference.

(Testimony of Roland Snodgrass.)

Q. According to your financial ability?

A. No, according to the distribution profits of the Association.

Q. Well, according to these figures the dairy-creamery unit makes a profit of $57,000. Then you consider that a profit of the Association?

A. Well——

Q. Do you, or do you——

A. No, that might not be any profit at all to the Association.

Q. Now, this Paragraph (7) provides that you pay these men all you get for their milk after deducting anything you have advanced them, and after deducting——

A. Well, I know what it says.

Q. Well, all right. And after deducting operating expenses and indirect overhead, and then, according to Paragraph (7) they are entitled to all the net, aren't they?

A. Well——

Q. Well, are they or are they not?

A. According to Paragraph (7) I believe they are entitled to all the net after those deductions.

Q. And you have been trying to pay them off as near as you could according to Paragraph (7)?

A. That is correct.

Q. What is it that has prevented you from paying them off entirely according to Paragraph (7) and not as near as you could?

A. Now, we are getting back—can I answer it at length?

(Testimony of Roland Snodgrass.)

Q. I hope it won't be too long.

The Court: Go ahead.

The Witness: When the Association took over the operation it had both losing and profit-making unit—it had both losing and profit-making units, and the existence of losing units would not permit at any time the Association to distribute all its profits based upon just the departmental earnings because in that case, supposing that it had five units which made $10,000 and five units which lost $10,000, it would break even. But suppose it paid out those five figures in black when its net profit or loss shows zero, it would liquidate itself at the rate of $50,000 a year, which is a physical impossibility.

Mr. Grigby: As near as possible means if you had to comply with the terms of that contract you couldn't run because so many departments lost money, or might lose money?

A. I believe that that is correct.

Q. Well, but that doesn't alter the fact that you were buying that milk under a contract as set forth in Paragraph (7)?

A. We bought it as set forth in the marketing contract.

Q. Paragraph (7)?

A. And we tried to follow Paragraph (7) [193] as closely as possible.

Q. Now, this is the contract and the only contract under which you bought anything, isn't it?

A. Yes, but there is Section 8 in there.

Q. But the contract as a whole?

(Testimony of Roland Snodgrass.)

A. That is right.

Q. Is this the only contract under which you purchased anything?

A. No, we have used other contracts on peas, but for the most part that contract is all.

Q. And this is the only contract under which you bought any milk from the dairymen?

A. That is right.

Q. And you say since 1940 you have never purchased it under any other provision than Paragraph (7)?

A. No, I didn't say that.

Q. You said you never had a flat price under Paragraph (8) since 1940, didn't you?

A. I said this: We tried to follow Paragraph (7) as closely as possible——

Q. But did you not say, since 1940 and from the time you delivered milk in Anchorage, you had never purchased milk from any dairymen at a fixed, flat price? Now, you can answer the question one way or the other?

A. Well, I didn't say that.

Q. Well, is it a fact?

A. I said we had never purchased milk since 1940 at any final price.

Q. All right. Then you haven't, have you, since 1940, ever purchased any milk from any farmer under Paragraph (8) of that contract?

A. 1945 maybe—not that I know of [194]

Q. Not that you know of; '45 maybe? So, all this flat price is an afterthought, isn't it, and a fake?

(Testimony of Roland Snodgrass.)

A. No, it is no fake. It is in the contract.

Q. It is in the contract, but it has never been elected?

A. It says at the discretion of the Board, and that probably means when a circumstance—a situation arises where they exert their discretion.

Q. And when they exert their discretion what do they do?

A. As I understand, when an emergency arose, it says—Section (8)—it gives them the right——

Q. And they have to notify the farmers?

A. I believe so.

Q. I will read your Section (8):

> "The Association is hereby authorized to process or manufacture into changed or new products the products delivered hereunder and pay the Producer as provided for in Paragraph 7, from the proceeds, from resale of the changed or new products or at its discretion to pay a flat delivery price therefor to the Producer as full payment * * *"

Now, you never have done that since 1940 in dealing with the milk farmers?

A. We have not done it since 1940.

Q. You have never told any seller of the price—that he was selling his milk at a flat, fixed price?

A. No, that is right,

Q. And you know that hasn't been done?

A. That is correct. [195]

(Testimony of Roland Snodgrass.)

Q. Do you know Mr. Rempel out here?

The Court: I think we had better suspend for a few minutes. Court will stand in recess until 11:15.

(Whereupon recess was had at 11:07 o'clock a.m.)

After Recess

Mr. Grigsby: Mr. Snodgrass, you know A. A. Rempel? A. Yes.

The Court: Who?

Mr. Grigsby: R-e-m-p-e-l. Do you remember he came to the Colony in the spring of '44?

A. About that time. I couldn't say for sure, but he was here in the fall, I believe, of '43 and came and settled here in '44 in the spring.

Q. And he sold milk to the co-op in the season of '44? A. Yes.

Q. And he brought cows with him, did he not, from the outside? A. Yes, sir.

Q. Do you remember during that time you were the manager? A. Yes.

Q. Did you explain to him the system of buying milk from the farmers when he went into business with you?

A. I couldn't say whether I did or not. I don't know.

Q. You won't say you didn't have a conversation with him?

A. No, I won't say I didn't.

(Testimony of Roland Snodgrass.)

Q. In which you showed him they paid so much down and showed him your own checks for subsequent payment to explain what he eventually——

A. It is quite possible because I showed [196] them to several people—it is probably so.

Q. Now, I notice here in the co-op statement for comparing the fiscal years 1944 and 1943—this is Defendant's Exhibit 1—there is a note on Page 3 of this exhibit reading as follows:

> "Additional payments to producers of milk, cream, eggs and meat in the amount of $47,-516.19, for 1943 were made in 1944 and charged against 1943 income."

Do you recollect that to be a fact?

A. Substantially that, yes.

Q. And that was also paid off in installments of, say, 20 per cent and then additional per cent?

A. That part on milk?

Q. On milk, yes, A. Uh-huh.

Q. The meat isn't in the Dairy Department, is it? A. No.

Q. But eggs are?

A. I believe at that time they were probably in the Meat Department.

Q. At that time they were in the Meat Department? A. Yes.

Q. In 1945 were eggs in the dairy-creamery?

A. In '45 I am very sure they were in the dairy-creamery.

(Testimony of Roland Snodgrass.)

Q. Well now, do you know what—from your books can you furnish what was paid for eggs and what was received for eggs?

A. I think perhaps by a little digging I could find the amount paid for eggs. I don't believe it would be so easy to find the amount received for eggs. That would take quite a bit of work.

Q. But in these figures which are in evidence here—you were here during the whole trial, and this alluding to Plaintiff's Exhibit 3, being a statement—comparison of years 1946 and '45, [197] there is an item, the "Cost of Goods Sold, Dairy and Creamery, $178,422.88" and it has been testified that of that amount $136,143.47 was paid to the milk producers—remember that, don't you?

A. Yes.

Q. That leaves a balance of about $42,000 that was paid for other goods. Now, do you know whether that $42,000 included what you paid for eggs? A. I believe it does.

Q. And you think you can find out what amount that was quite easily?

A. I believe so, yes.

Q. Do you know, having been manager in '45, what else that $42,000 difference included?

A. This is on cost of goods sold, isn't it?

Q. Yes.

A. Well, it should include all the material which went in the manufacture of popcicles; it should include butter which was purchased to go into the

(Testimony of Roland Snodgrass.)

ice cream; it should include a certain amount of powdered milk; it should include——

Q. Extracts?

A. Extracts, dairloid, powdered eggs, possibly even salt.

Q. You didn't put any fresh eggs in that manufacture in the creamery?

The Court: What is the question?

Mr. Grigsby: No fresh eggs used.

A. There could be, although it wouldn't be customary—although if they get cracks they might buy them so much a pound and use in ice cream.

Q. But for the most part you used powdered eggs?

A. For the [198] most part, powdered eggs, yes.

Q. Now, I asked the other day, if that could be broken down and if I could have those figures. Do you know whether you can furnish that information or not?

A. Let's hear, what is the information again?

Q. What that $42,000 was spent for?

A. Well, I suppose the accountant could find that.

Q. Well, why should it be difficult?

A. Well, it would entail going over the purchases from perhaps half a dozen companies—maybe 15 companies—for an entire year, all of which would be over in a dead file in the warehouse.

Q. Well, you have got your books for '45 accessible on everything else. You have got the total here, $178,422.88, and you have got 136,000 of that

(Testimony of Roland Snodgrass.)

paid to milk farmers. Why haven't you a statement there where the rest of it went?

A. Well, you see, the cooperative having to distribute its profit, keeps a record of its purchases from members and a record of its sales to members. It has to do those in order to have knowledge of where its profits must be distributed, but it does not keep a record of the salt that it buys, or the operating supplies it buys. It doesn't keep it except in the one total. The auditor simply finds you paid so much money, and those are coded and the code is all that is kept.

Q. Now, Mr. Snodgrass, have you any way of determining whether or not the creamery down there made money?

A. No, the [199] only thing that you know to start with—when the auditor gets through—is that the combined creamery and dairy on its operation showed a profit.

Q. That is all you got?

A. That is all you have and that is still somewhat arbitrary.

Q. And part of the farmers' milk went into the creamery down there, too?

A. Yes, a certain amount of it goes in.

Q. Do you know how much?

A. No, I don't.

Q. Well, can they readily produce how much was sold as milk in Anchorage?

A. Well, I think Mr. Allyn furnished you with

(Testimony of Roland Snodgrass.)

a record showing you the dollar value sold in Anchorage, and, that is in Anchorage and Palmer and other points.

Q. Well, that's what I mean—marketed as milk?

A. Yes, I believe that has been done. I think perhaps you have the figures.

Q. We have the figures you paid them $136,131 and some cents in '45 in bi-weekly payments——

A. Uh-huh.

Q. And you never paid them anything after that? A. Uh-huh.

Q. But on the stand the other day Mr. Allyn estimated from some guess that had been made for the operations in 1944 that the creamery had made $20,000 in '45. That was just an arbitrary estimate, wasn't it?

A. No, it isn't—it isn't arbitrary completely. There is something slightly arbitrary about splitting off the one part of the operation from another part of the operation.

Q. Well, anyway, now, you take the year 1944: At the end [200] of the year 1944 the dairy-creamery showed a profit of $66,961.03 as compared with $57,000 at the end of the year 1945. Are you familiar with that, that that is about the relation?

A. That is about right.

Q. Now, in '44, they made the farmers payment —that is paid in '45—paid the milk producers $47,-516.19, meat being also included in that, being

(Testimony of Roland Snodgrass.)

somewhat less than that, but it would be, anyhow, over $40,000 additional.

A. That's good enough to work with.

Q. Wouldn't it? A. Uh-huh.

Q. Now, in '45 they have $57,000 to the credit of the dairy-creamery, net, and if they had followed the same system that would have been distributed in proportion?

A. No, not necessarily.

Q. What is that? A. Not necessarily.

Q. If they had followed the same system?

A. Well, that is where I differ. That is, the system which they followed was to distribute that part of the net earnings of the Association which was made by the creamery and dairy.

Q. Yes, all right. Now—and you have the figures here that the creamery and dairy in '44 earned a net profit of $66,961.03 and since you had the money you gave it to them.

A. Because we had the Association earnings we gave it to them.

Q. Well, because you had the money—it was left—to pay?

A. Well, I will agree with you there, although what we mean by [201] "had the money" we may differ on.

Q. Well, you did have it, didn't you? You paid them?

A. But you see, we could have the money by liquidating inventories, but if the Association didn't show a profit you wouldn't have the money.

(Testimony of Roland Snodgrass.)

Q. But you didn't have to liquidate inventories——

A. No, we had net earnings in '44 to distribute.

Q. And if you had had the earnings in '45 they would have been paid the same way?

A. That is correct.

Q. So, the only reason you didn't pay was because you didn't have anything to pay them with?

A. We didn't have the earnings to pay them with, that's right.

Mr. Grigsby: Now, your Honor, I have a number of witnesses from the Valley that I don't like to bring back tomorrow if I can get through with them today. Can I excuse this witness for the present and he will be here throughout the trial anyway, I suppose.

Mr. Davis: I will have the right for re-cross, your Honor?

Mr. Grigsby: Certainly.

The Court: Yes. You may step down, Mr. Snodgrass.

Mr. Grigsby: Mr. Rempel?

AARON A. REMPEL

being first duly sworn, testified for and in behalf of the plaintiff as follows:

Direct Examination

By Mr. Grigsby:

Q. Will you tell the Court your name?

A. Aaron A. Rempel.

Q. Are you one of the dairymen down in Matanuska Valley? A. Yes.

Q. And are you one of the dairymen whose claim is involved in this law suit? A. Yes.

Q. When did you come to Alaska, Mr. Rempel?

A. I come to Palmer February 18, 1944.

Q. And did you bring any cows with you?

A. Yes.

Q. Now, that year, did you sell milk to the defendant Association?

A. I started to deliver milk that year, first of March?

Q. The first of March? A. Yes.

Q. Did you sign a contract? A. Yes.

Q. Did you sign one of these yellow contracts before you started in? A. Yes.

Q. Sign a document like that? A. Yes.

Q. Now, before you started in delivering milk did you have a conversation with the management?

A. Yes.

Q. As to what you were going to get for your milk? A. Yes.

(Testimony of Aaron A. Rempel.)

Q. How was it explained to you you were to be paid?

A. He explained to me that we——

Q. Who did it? A. The general manager.

Q. Who?

A. Mr. Roland Snodgrass was at that time manager.

Q. All right?

A. He explained to me, we get down payment—I don't remember—better than $6.00, four per cent—— [203]

Mr. Davis: I am sorry, I can't understand——

Mr. Grigsby: So far, he explained he paid him $6.00 for——

The Court: The witness may repeat. You had better repeat it again. Mr. Davis didn't hear it.

Mr. Davis: I heard him, but I didn't understand him.

The Witness: The down payment was better than $6.00.

Mr. Grigsby: Per what?

A. Per hundred pounds, four per cent butterfat.

The Court: Did you say about $6.00?

The Witness: A hundred pounds.

The Court: $6.00 a hundred pounds?

The Witness: Yes.

Mr. Grigsby: He said a little better than $6.00.

The Court: Oh, a little better than $6.00?

The Witness: Yes.

(Testimony of Aaron A. Rempel.)

Mr. Grigsby: And go ahead, what's the rest of the conversation—the explanation?

A. The manager explained that after the year's over then what is made, profit, on the milk is divided and you recover in two payments. He just had received one payment. I don't remember exactly what his check was, but it was a—payment he got and he expected another payment sometime later in the year.

Q. He showed you a check?

A. He had a check in his hand. He showed me he just got a check.

Q. That was the additional payment for the '43 operations, [204] was it? A. Yes, '43.

Q. And do you remember about what percentage it was—whether it was 10, 20, 30 or 40? Do you remember the percentage?

A. No, I don't remember that. It was late in '44 when I got payment and I know the per cent what I got, but I don't know how much it was. But this was a check, and he told me that later on he will get another payment.

Q. He was explaining to you that for the milk he sold in '43? A. Yes.

Q. Along in March, when you were talking to him, he had got a pretty substantial payment and would get another one?

A. Yes, it was in February I talked to him—first of March I started already to deliver milk.

Q. And that was his explanation to you of how

(Testimony of Aaron A. Rempel.)

you're paid for your milk and how you would be paid? A. Yes.

Mr. Grigsby: You can take the witness.

Cross-Examination

By Mr. Davis:

Q. Now, Mr. Rempel, when you sold milk—how many cows did you have?

A. I didn't bring over ten cows.

Q. Did you sell milk to the co-op in 1944? You came, now, in February, 1944? A. Yes.

Q. Did you sell some milk in the year 1944?

A. Yes, started March 1, I started to deliver milk.

Q. And in 1944, then, according to their books, that goes [205] until November of 1944, is that right? A. I don't——

Q. According to the set-up of the books, they are on a fiscal year that ends in November each year? A. Yes.

Q. Now, did you deliver your milk to the co-op?

A. Yes.

Q. Did you deliver it yourself?

A. No. That time Mr. Linn, he was delivering my milk to the co-op.

Q. Now, were you here during the time that Mr. McAllister and Mr. Monaghan testified two or three weeks ago? A. No.

Q. You weren't down here during that time?

A. No, I wasn't.

Q. Now, how were you paid for that milk, Mr. Rempel?

(Testimony of Aaron A. Rempel.)

A. I got—they got every two weeks, the 20th and the first of the month—I got paid for the milk. That time I delivered ungraded milk; I didn't have any grade milk, and they was getting less than $6.00 for this——

Q. When did you start delivering grade A milk?

A. That's this year.

Q. Just this year? A. Yes.

Q. You have always delivered Grade B milk?

A. Yes.

Q. Prior to 1947? A. Yes.

Q. Or, possibly 1946?

A. No, I started in '47.

Q. In 1947? You got, then, each two weeks you got a check? A. Yes, two times a month.

Q. What was that check based on, do you know? How did they figure that check you got each two weeks, do you know that?

A. After the year was over I got checks—I got a coupon still that [206] says "second payment on milk pool."

Q. I will get to that in a minute, but the two-weeks payment: Do you know how that was figured—the payment you got every two weeks?

A. $6.00 every hundred pounds, according to the contents of cream.

Q. And that figure was standard for all the dairymen up there? They paid them all so much a hundred pounds for that two-week payment?

A. Two-week payment according to the amount of milk delivered.

(Testimony of Aaron A. Rempel.)

Q. And according to grade? They paid different for Grade A from Grade B? A. Yes.

Q. And they paid different from one cream content and different for another? A. Yes.

Q. Do you know what is done with the Grade B milk? A. Yes, I know.

Q. I am sorry? A. Part of it I know.

Q. Well, it is a fact, isn't it, Mr. Rempel, the Grade B is put into ice cream and into other products the creamery manufactured—isn't it?

A. That is what the law requires, yes.

Q. Yes, the Grade B milk is not supposed to be sold as milk? A. No.

Q. Do you remember how much money you received for your milk in 1945?

A. I can tell exactly——

Mr. Grigsby: Excuse me, you mean milk produced in '45?

Mr. Davis: Yes, I don't mean the payment made in '45 for [207] 1944, Mr. Rempel?

A. I didn't get——

Q. Do you remember how much you got in money for the milk you delivered in 1945?

A. That—I didn't get—yes, that's what I——

Q. These two-week payments, Mr. Rempel: Do you remember how much you received?

A. I can't say exactly, but I believe around 2,000—maybe less or more.

Q. Well, I have it down here 48,925 pounds that you delivered that year—that's 1945?

(Testimony of Aaron A. Rempel.)

Mr. Grigsby: That's Grade A, according to this——

The Witness: No, that is Grade B.

Mr. Davis: And that you received 2300—I believe it is $2330 some odd cents that year?

A. That's about it—about $2,000. I didn't remember exactly; I believe that is correct.

Q. Then, going back to the year 1944, you received, did you, these two weekly payments—you received a check every two weeks? A. Yes.

Q. And then at the end of the year you got that slip you have there? A. I have got two tags.

Q. That is one of them and you had another like it?

A. This was the last. The other was before.

Q. That is the second? A. Yes.

Q. You were satisfied, were you, Mr. Rempel, with the way this matter was handled in 1944?

A. Yes.

Q. But you are not satisfied with the way it was handled in [208] 1945? A. No.

Q. You are one of the plaintiffs in this case?

A. Yes.

Q. That is, you are one of the men who assigned his claim to Mr. Monaghan? A. Yes.

Q. And you assigned that for the purposes of collecting further money? A. Yes.

Q. Mr. Monaghan doesn't own your claim, does he? A. No.

Q. If he gets anything out of it he is to split with you according to what your claim is?

(Testimony of Aaron A. Rempel.)

A. Yes.

Mr. Grigsby: I will stipulate that is the case as to all of them, Mr. Davis.

Mr. Davis: Yes, I don't think there is any dispute about that. Now, Mr. Rempel, as a matter of fact, the payments which were made to you on this two week basis were higher in 1945 than they had been in 1944, weren't they, for the same amount of milk? A. No, but even lower.

Q. I am not talking about all the payment you got, now. I mean the so much per hundred pounds was higher in 1945 than it was in 1944?

A. They started to cut down the price on the ungraded and the B Grade milk—that they was getting less.

Q. Now, in 1944 you were getting $5.15 a hundred pounds for Grade B milk, weren't you?

A. For awhile, and then later on I was getting $3.50.

Q. For Grade B? A. Yes.

Q. What is the difference, by reason of the different cream [209] content?

A. By reason of ungraded milk—not Grade A milk.

Q. And then in 1945, in August, the price on Grade B milk went to $5.35, didn't it? I shouldn't ask you. You probably don't remember.

A. In '46 the price was cut down on Grade B milk.

Q. But up until '47 your milk was always Grade B? A. Yes.

(Testimony of Aaron A. Rempel.)

Q. Now you are selling Grade A milk?

A. Yes.

Q. And without trying to get the exact figures, you probably don't remember them, but the price of Grade B milk was raised several times in 1945 over what it had been in 1944, isn't that correct?

A. Yes. But then, that's the general manager —at that time, Mr. Harris—he told us of the meeting of the dairymen that he was making more and more on Grade B milk than from Grade A milk.

Q. Mr. Harris wasn't manager until 1946, was he? A. He was general manager.

Q. But not until 1946, was he? A. In '46.

Q. Yes. Now, I asked if you didn't receive several raises in the base price of your milk during the year 1945 over what it had been in '44?

A. Only when I got more when the grade was better—more fat content.

Q. Now, supposing the grade was the same. You sold Grade B milk all during 1945? A. Yes.

Q. Now, if your Grade B milk in 1945 was always four per cent milk—of course, it wasn't; it would vary from time to time—but if it was always four per cent milk, the price per [210] hundred pounds went up three different times in 1945, didn't it? A. I don't know that. I don't think so.

Q. Well, I have here a paper that says that the price of Grade B milk for four per cent in 1943 and 1944 was $5.15; that on August 1, 1945, it went to $5.35; on September 1, '45, it went to $5.85; and on Sepember 16, 1945, it went to $6.35. Now, do you have any remembrance about that at all?

(Testimony of Aaron A. Rempel.)

A. I—what I notice—I didn't know that. I always put it up that the fat contents was getting better. I always was getting—you see, I had the fat contents from 3.5 and later to 4.6.

Q. So, of course, your milk was worth more, even if the price hadn't been changed, when your fat content was better? A. Yes.

Q. But you don't know anything about whether the price was raised during that time for the same grade of milk?

A. Yes, it was, I remember now, in the winter time—was paid even dollar more than the summer time for Grade A milk.

Q. But that is your winter bonus? They paid the farmers a bonus? A. Yes.

Q. If they produced a certain amount of milk in the winter time didn't they? But you don't know whether or not these raises I have been talking about are the winter bonus at all?

A. No, I didn't know anything——

Q. Well, the winter bonus wouldn't be paid in August? Your milk wouldn't be raised in August for a winter bonus? A. No, it [211] was later.

Q. I think that is all, Mr. Rempel.

Redirect Examination

By Mr. Grigsby:

Q. Mr. Rempel, let me have that paper. That refers to the payment you got in '45 for the milk sold in '44? A. Yes.

(Testimony of Aaron A. Rempel.)

Mr. Grigsby: We offer it in evidence.

The Court: Is there objection?

Mr. Grigsby: Any objection? (Handing to Mr. Davis.)

Mr. Davis: I don't think so.

The Court: It may be admitted and marked Plaintiff's Exhibit 7.

(Plaintiff's Exhibit No. 7 admitted in evidence.)

PLAINTIFF'S EXHIBIT No. 7

Remittance Advice—No Receipt Required
Matanuska Valley Farmers Cooperating Association

Date of Invoice	Description	Gross Amt.	Discount or Deduction	Net Amt.
	Second payment on milk pool			
	20% of dollar value—$1895.56	$379.11		
	Less 2% reserve		$7.58	$371.53

[Endorsed]: Filed August 5, 1948.

Mr. Grigsby: That is all, Mr. Rempel.

The Court: That is all. How long will it take you to put on these witnesses you wish to have testify today?

Mr. Grigsby: It depends on the cross-examination. I can be very brief.

The Court: Well, if it is agreeable with everybody court will now stand in recess until two o'clock.

(Whereupon recess was had at 11:51 o'clock a.m.)

Afternoon Session

The Court: Another witness may be called in the case on trial.

Mr. Grigsby: Call Mr. Quarnstrom.

CLARENCE QUARNSTROM

being first duly sworn, testified for and in behalf of the plaintiff as follows:

Direct Examination

By Mr. Grigsby:

Q. Mr. Quarnstrom, your name is Clarence Quarnstrom? A. Yes, sir.

Q. You are one of the claimants in this action?

A. Yes, sir.

Q. When did you come to Alaska?

A. In May—23, 1935; landed in Seward.

Q. And when did you go to the Matanuska Valley to live? A. That is right.

Q. Did you become a member of the co-op?

A. Yes, as soon as it was organized and I was given the opportunity I became a member.

Q. And since that time have you been a milk producer?

A. No, not right from the start.

Q. When did you start selling milk to the defendant corporation?

A. I think about the spring of 1939. I don't

(Testimony of Clarence Quarnstrom.)

have the exact date, but that would be approximate.

Q. Have you sold milk to them ever since that date?

A. I think—without a break, I think, continuously.

Q. And up to and including the present time?

A. I am still selling milk, yes.

Q. Now, did you sign one of these marketing contracts?

A. Yes, I have one here. [213]

Q. Entitled "Matanuska Valley Farmers Cooperative Association Member's Standard Marketing Contract"?

A. Yes, I signed that.

Q. Do you know what year?

A. No, I don't, but I think 1937.

Q. Now, you have, you say, sold milk to the Matanuska Valley Farmer's Cooperative Association ever since—well, anyhow, prior to 1940?

A. Yes.

Q. Now, what was your arrangement with them as to the price you were to receive for that milk?

A. Well, to start with, we just sold our milk there and just brought the milk there and they paid us for it what they thought was right.

Q. Well now, how long did that system continue?

A. Well, in my mind, it continued that way until one time we—there was some discusion about cutting the price of milk. Up until that time I had under-

(Testimony of Clarence Quarnstrom.)

stood it would be just a flat price—that's my understanding of it—and there was some discussion about cutting the price of milk. And they had a meeting, and so we asked Mr. Stock—he happened to be present at this meeting—a group of the dairymen—and I asked him—or, I didn't ask him, but it was asked what the Board had in mind in cutting the price of milk, and he told us—maybe I could almost quote him—he said: What are you fellows crabbing about in the cut of price of milk? If the dairy makes any money there is nobody but you fellows can get a nickle of it; nobody else can touch it. And that was about the beginning of the time when I realized that we were selling milk on a pool basis. [214]

Q. Well now, prior to that—do you know what year that was you had this meeting and this conversation?

A. No, I don't. That would be about '41, I imagine.

Q. Well now, since that time, describe to the Court the modus operandi—the system under which you have sold your milk, how you were paid?

A. Well, we have been paid every two weeks, get a check for the milk according to the number of pounds of milk at a set price according to the test of the milk for butterfat content, and with the understanding that if there was any profit to be made it will be divided among the dairymen at the end of the year—any profit in the dairy——

(Testimony of Clarence Quarnstrom.)

Q. You mean that after the close of the dairy year, then subsequently the profit would be divided?

A. That is right, after the year has been closed and they find out just what their operating expenses have been and just what it cost to handle the milk—well then, they prorate the dairy profits back to the dairy——

Q. By pro rata you mean according to the amount of milk? A. That's right.

Q. Now, that was, you think, about '41?

A. Well, I don't know the exact date. I didn't write it down, but it is quite a long time ago.

Q. Was it as long ago as '41 or '42?

A. Yes, '42 would be the very latest.

Q. Now, since that time has that been the system?

A. Yes, [215] that has been the system that I have sold milk and that is the system that I have received pay for the milk.

Q. Now, I will ask you whether or not, for the milk that you sold them in the season 1942, you received additional payments after the close of the season? A. I think that I did.

Q. And '43?

A. I received additional pay in '43.

Q. Well, and for the milk you sold in '43 did you subsequently receive additional payment?

A. Yes, I received additional payment in '44.

Q. And for '44 production did you receive additional payments in '45? A. Yes, I did.

Q. Have you any documents there showing that?

A. I have a couple that I just accidently hap-

(Testimony of Clarence Quarnstrom.)

pened to save. I wasn't in the habit of saving them, but I just happened to run across two. There is no date on one, and the other one is dated September 10, 1945.

Q. Now, was that for milk sold in '44?

A. Yes.

Q. And that reads: "Final Payment on Milk Pool." Prior to that had you received payment on the '44 production? In '45?

A. That's dated——

Q. September 10——

A. Yes, I am quite sure that I received another payment of 400 and some dollars, previous to that—this is for 521.

Q. Do you know what year this one is for?

A. No, I am not sure of that.

Q. This reads: "Second Milk Pool Advance. 20% of Dollar [216] Value purchased, Less: 2% Statutory Reserve." You don't know what——?

A. I think that was early in the year of '44, on '43 production. I am not sure; that is just my guess.

Mr. Grigsby: We offer these two slips in evidence. (Handing them to Mr. Davis.)

Mr. Davis: No objection.

The Court: They may be admitted and marked Plaintiff's Exhibits 8 and 9.

(Plaintiff's Exhibits 8 and 9 admitted in evidence.)

(Testimony of Clarence Quarnstrom.)

PLAINTIFF'S EXHIBIT No. 8

Remittance Advice—No Receipt Required
Matanuska Valley Farmers Cooperating Association
Palmer, Alaska

Date of Invoice	Description	Gross Amt.	Discount or Deduction	Net Amt.
	Second "milk pool" advance:			
	Total amount purchased $1947.26			
	20% of dollar value purchased	$389.45		
	Less 2% statutory reserve	7.79		
	Amount of second advance			$381.66

(Endorsed)
Clarence Quarnstrom

[Endorsed]: Filed August 5, 1948.

PLAINTIFF'S EXHIBIT No. 9

Quarnstrom, Clarence — Final Payment on Milk Pool September 10, 1945

Total dollar value production $2519.94 x 21.125%	$532.34
Less 2% S.R.	10.65
Net amount of draft	$521.69

[Endorsed]: Filed August 5, 1948.

Mr. Grigsby: Mr. Quarnstorm, were you present at a meeting of the dairymen and the directors of the co-op sometime last spring before this suit came up? A. Would you know the date?

Q. In March, I believe?

A. In March? Well, I was to a meeting of the dairymen with the representation of the co-op Board

(Testimony of Clarence Quarnstrom.)

either late in March or early in April a year ago. I don't know the date.

Q. Now, was this controversy discused there—this matter of your getting this profit for '45 that is in controversy here? Was that under discussion?

A. I believe that the dairymen asked, or invited the co-op Board to be present at a meeting for the express purpose of discussing this payment.

Q. And was it discussed?

A. It was. That was the only thing that was discussed.

Q. Now, at that time was Mr. Stock present?

A. Yes. [217]

Q. And was there anything stated by him with reference to the co-op owing or not owing you this money—you dairy producers?

A. If I am not mistaken, one of the dairymen asked Mr. Stock—or maybe he was addressing the complete Board—that—the members that were there—they weren't all there, but there was a quorum there—"do you feel that the dairymen have this money coming?" And I think Mr. Stock said—or one of the members said: "I can't speak for the whole Board, but personally, I think that you fellows have it coming; but what are we going to pay you with?"

Q. To the best of your recollection, who made that statement?

A. That statement—was Mr. Stock who made that statement.

(Testimony of Clarence Quarnstrom.)

Mr. Grigsby: You can take the witness. Just one other question—well, never mind; go ahead.

Cross-Examination

By Mr. Davis:

Q. Now, Mr. Quarnstrom, you are one of the original incorporators, I guess, of the Matanuska Valley co-op, aren't you?

A. Well, I was one of the—I joined the co-op as soon as it was organized.

Q. Yes, back in 1935, '36, '37—somewhere in there? A. My contract is dated June 22, '37.

Q. All right, you're one of the early members of the co-op? A. That is right.

Q. To begin with you weren't——[218]

The Court: Wait just a minute. I didn't get that—what is the date of that contract?

The Witness: 22d of June, 1937.

Mr. Davis: Have you had any official position with the co-op, Mr. Quarnstrom? A. No.

Q. Ever been a director or officer of any kind.

A. No.

Q. Do you know who drew up those contracts or how that particular contract happened to be adopted? Do you know anything about that?

A. No, I often wish I did.

Q. Well, they actually came from Washington, didn't they? A. I wouldn't know.

Q. Don't know anything about it?

A. I don't know.

(Testimony of Clarence Quarnstrom.)

Q. Now then, up until 1939 to the best of your recollection you didn't produce milk?

A. No, I might have sold them some cream previous to that, but very little.

Q. You weren't in the dairy business on a major scale? A. No.

Q. Then, in 1939 you went into the dairy business and since then you have sold them milk every year?

A. That is right.

Q. And you are selling them milk now?

A. That's right.

Q. And if I understood your testimony correctly, up until sometime, possibly, as late as '42—maybe '41—you figured that the payment you got every two weeks was the final payment on your milk. That was the payment?

A. Well, I, like a lot of others I imagine, had failed to read the contract and understand the provisions whereby the terms of sale were—and furthermore, [219] as Mr. Snodgrass testified the Produce Department had been running in the red and we just didn't expect any profits. Now, I don't know whether I figured it was a flat price or just figured that they wouldn't make any profits so there would be nothing to divide.

Q. Yes, we are going into a lot of discussion on flat prices or advances. I don't want to get into that; that is for the Court to decide. I do want to know what was done and the Court can decide what the payment was, but it was your idea at

(Testimony of Clarence Quarnstrom.)

hat time you were receiving a flat payment until something further took place?

A. Well, as I said before, I don't know as I ever formulated any definite ideas as to whether it was a flat price or a pool price, but nevertheless, that payment that I got every two weeks was all I expected to get.

Q. And the fact of the matter was it was all you did get? A. All I did get, yes.

Q. Up until, maybe, 1941—'42—something like that? A. That's right.

Q. Now, you too, in 1945, were paid every two weeks, I presume, for the milk you had delivered in the previous two weeks? A. That is right.

Q. I don't mean, now, to pin you down to say you were paid in full; I am not trying——

A. I received money every two weeks, yes.

Q. You got money every two weeks based on the amount of milk [220] you had delivered the previous two weeks? A. That's right.

Q. At a price per hundred pounds for a certain grade—whatever grade you delivered?

A. That is right.

Q. Now, did you deliver Grade A milk or Grade B milk? A. Grade A milk.

Q. And your milk has been Grade A ever since they have been grading it that way?

A. I was one of the first to start in Grade A. I think my number at the dairy is No. 7, so presumably six producers that produced Grade A milk before I did, which all took place in a matter of, maybe

(Testimony of Clarence Quarnstrom.)

a month or six weeks from the time they actually started to sell Grade A milk in Anchorage.

Q. All right. Now then, did you receive extra payments for the year 1943? At least?

A. Yes.

Q. And 1944? A. Yes.

Q. You haven't received anything for '45 except the payments made to you every two weeks?

A. That's right.

Q. These two slips you have offered here are further payment to you, one you believe for 1943 and one for 1944?

A. One, I know, is for 1944—the date is on it. The other I am not sure.

Q. You think it might be '43?

A. Yes, judging by the percentage that is listed on there and comparing them with other slips, that's my conclusion.

Q. Now, can you tell the Court how these additional payments were made—how they were based?

A. Not entirely, no.

Q. Do you know anything about it at all?

A. Well, made on [221] profits made by the dairy, and prorated back to the dairymen.

Q. Could it be on profits made by the Association—the entire co-op?

A. Well, not my understanding of it. If the co-op had made anything, say, in the Trading Post, I would have received certificate of equity for my percentage of trading there, and the same in the garage and warehouse, and so forth. In fact, I did,

(Testimony of Clarence Quarnstrom.)

receive certificates of equity for any profits that were made in the other departments in addition to the cash that I received from the dairy.

Q. You were entirely satisfied, were you, Mr. Quarnstrom, with the settlement made with you in 1943?

A. Not knowing the figures, and not being definitely interested in—I was satisfied, yes.

Q. At any rate, you were well enough satisfied so you didn't go checking up further?

A. That's right.

Q. And the same thing is true of 1944?

A. I was, yes.

Q. And 1945, since there wasn't an extra payment, you are not satisfied?

A. And since looking into the accounts which were—of the Association, which were never made available to the members except on special request, and I don't know I am exactly satisfied with the settlement of '43 and '44 now.

Q. Now, the fact of the matter is, these accounts have been presented at each of the annual meetings, haven't they, ever since the co-op was started?

A. Did you ever hear about a mile of figures shot at you as fast as anybody could read and try to [222] segregate them?

The Court: Do not question counsel. You can explain anything you want to. He is not permitted to answer questions.

The Witness: Well, those have been submitted,

(Testimony of Clarence Quarnstrom.)

yes, in such a manner as seen fit by the Board of Directors.

Mr. Davis: And if you had wanted to you always had a right to go look them up?

A. Yes, but you had to exert your right and if you went into the office to receive some figures you were looked at as though you were—well, just a—someone trying to make trouble. The figures were not freely given you, in other words.

Q. Now, at this meeting last March or April, do you remember who was there?

A. Well, I think I know who of the Board of Directors were there.

Q. Will you tell us who they were?

A. L. C. Stock, for one, Virgil Eckert for one, Clarence Hoffman for another and Ray Rebarcheck for the fourth. Those I know were there.

Q. That wasn't a Board meeting?

A. That wasn't a Board meeting.

Q. That was a meeting called by you fellows at which the members of the Board were invited to attend? A. That's right.

Q. And four of them did attend?

A. That's right.

Q. And at that time you discussed milk prices in general? You spent the whole meeting discussing milk prices?

A. We spent the whole meeting discussing this particular case—[223] payment of milk for 1945.

Q. Well now, you said something like this, if I got it right: Said somebody asked either Mr. Stock or the Board as a whole: "Do you feel the dairymen

(Testimony of Clarence Quarnstrom.)

have this money coming?" And Mr. Stock answered: "I think you do, but I don't know how you can be paid." What money are you talking about, Mr. Quarnstrom?

A. I am talking about this $57,000 overage in the dairy.

Q. Do you feel that the dairymen are entitled to all that $57,000?

A. A large percentage of it.

Q. Do you think they were entitled to the money the egg producers put in, for instance?

A. Did the egg producers put in any money?

The Court: Do not ask questions.

The Witness: No, I don't feel we were entitled to money on eggs actually bought in the co-op.

Mr. Davis: How about the ice cream, popcicles, and so forth?

A. Inasmuch as some of the milk was used for popsicles and ice cream and so forth, I feel the dairymen should have a share of that profit.

Q. By share do you mean all of it?

A. No sir, I mean their just share.

Q. Who is going to figure that just share.

A. Well, it should—the co-op should be set up to do that.

Q. Now, you fellows here have sued for the $57,000, or at least for your share of it, according to the milk produced by [224] 22 men. Do you honestly feel that the dairymen here—these 22 dairymen—are entitled to all that $57,000, that is their proportionate share of it? A. Yes.

(Testimony of Clarence Quarnstrom.)

Q. How do you figure that the co-op is going to operate if they do that?

Mr. Grigsby: Objected to as immaterial.

The Court: Overruled.

The Witness: I don't know just what you mean.

Mr. Davis: Well now, there have been some losing propositions in that co-op from the start, haven't there? A. That's right, I imagine——

Q. They have varied from time to time. The garage used to make money; in 1945 it lost. The Trading Post has made money on some occasions; in 1945 it lost. A. That's right.

Q. But there have always been some losing propositions, haven't there?

A. Yes. The losses have been made up, as I understand it—now, this might be right or it might not be right—by the consumer profits—profits that are distributed among—or, contributed by the farmers as well as the city dwellers in the store and garage and warehouse, on consumer goods, rather than on producer goods.

Q. As a fact of the matter, haven't certificates of equity been given to all the members on this consumer profit—the garage, the Trading Post, the warehouse?

A. Yes, but those certificates of equity, in my understanding, are not payable [225] unless the co-op has sufficient money and—I think, to leave a reserve even after they are paid of twice the amount of the indebtednes, so in my estimation the papers are practically worthless. At the present

(Testimony of Clarence Quarnstrom.)

time, they are worthless, until their due date. They are just not worth a penny.

Q. Well, by the same token, a government bond would be worthless until a due date, wouldn't it, because it isn't due yet?

A. It can be turned in for a percentage, though, I understand—I don't have any.

Q. All right, Mr. Quarnstrom, you don't know as to how these figures of the overage you got in 1943 and 1944 were arrived at? A. No, not exactly.

Q. You don't know what they used to start—what figure they used to start with, or on what basis it was paid out?

A. They used the profits from the dairy to start with.

Q. Now, you said that awhile ago. Do you know that was the case? A. Yes, the dairy profits.

Q. I asked you whether it wasn't, in fact, the profits of the co-op, which were used to start with?

A. Well, no, it wasn't.

Q. Now, the fact is the dairy in 1944 made a profit of some $60,000, didn't it—the Dairy Department as such?

A. The Dairy Department, yes, made $66,000, I think.

Q. Now is it your understanding all that $66,000—or $60,000—whatever it was—was distributed back to the milk producers?

A. No, it wasn't. There was a certain percentage of [226] it withheld by the co-op as profit made by the ice cream and eggs and so forth.

Q. That is your understanding as to what took

(Testimony of Clarence Quarnstrom.)

place? A. That is my understanding, yes.

Q. Now then, if the management—the fellows that were in management—have testified that the profits that were distributed were the profits of the co-op as such—not the profits of any particular department—would you say they are wrong as to what took place?

Mr. Grigsby: Objected to as argumentative.

The Court: Objection is sustained.

Mr. Davis: That is all, Mr. Quarnstrom.

Redirect Examination

By Mr. Grigsby:

Q. Just one other question, Mr. Quarnstrom: Did you raise vegetables in 1945 also?

A. Yes, I did.

Q. Potatoes? A. Potatoes.

Q. On one of the exhibits in evidence it is shown that the cost of produce, meaning vegetables—potatoes and other produce, outside of dairy products—is some $76,000. That is for the year 1945. Also a similar amount is shown for the cost of produce in 1944. Now, were you paid in 1946 additional payments in addition to your share of that $76,000 for the potatoes you sold in '45?

A. Well, I don't know just exactly what you mean, but I received an additional payment in 1946 besides the [227] advance price paid at the time of harvest for potatoes.

Q. When did you get that additional payment?

A. It wasn't very long ago. It was, I think,

(Testimony of Clarence Quarnstrom.)

September or October—last fall, almost a year after the potatoes were delivered.

Q. In 1946, then? It is in evidence that the books of the corporation show, Mr. Quarnstrom, that the Produce Department—that is, the department not including dairy products—cost of goods sold was $76,976.05. Now, you sold them produce?

A. Yes.

Q. In the year 1945? A. Yes.

Q. And potatoes? A. Yes.

Q. Mostly?

A. Mostly potatoes. In fact—well, I will say mostly potatoes.

Q. Well now, do you know whether in addition to that $76,976 the co-op paid further payments on potatoes, in 1946, to you as well as the other producers?

A. I wouldn't know whether it was in addition to that 76,000 or whether it was a part of it, but I think it was likely in addition to that. That 76,000 was set up, I imagine, at the time of the audit early in 1946.

Q. That audit covers the period ending November 30, 1945. Now, according to the audit it was made prior to February 11, '46. Was it subsequent to that? A. Yes, it was after that.

Q. It was after that you received additional payments for potatoes? A. Yes.

Q. And do you know whether the other members did?

A. Well, I know of several of them, personally, that did. [228]

(Testimony of Clarence Quarnstrom.)

Q. And was that a percentage? What was the percentage?

A. Percentage I couldn't give you, but I received $88.00 additional payment on about 34 tons—about two and a half dollars a ton.

Q. About two and a half dollars a ton?

A. Roughly.

Q. Now, do you know where that money came from? A. No.

Mr. Grigsby: That's all.

Recross-Examination

By Mr. Davis:

Q. Mr. Quarnstrom, is there a proceeding before the co-op at the present time to suspend you for selling potatoes outside of the co-op?

A. Not that I know of.

Q. Don't know anything about it at all?

A. No, sir.

Q. Didn't you sell some potatoes last year outside of the co-op contrary to your agreement?

A. No, sir.

Q. This extra money that came to you in 1946, you don't know where that came from?

A. The co-op manager had his name on it, that's all I know.

Q. Yes, I know it came from the co-op, but you don't know from what source in the co-op? It might have been some potatoes were sold at that time, mightn't it?

A. Could have been.

(Testimony of Clarence Quarnstrom.)

Q. Potatoes as such are not sold every day like milk. They are sold as time goes on, aren't they? They are taken and gathered in one place and sold out over a period of quite a time?

A. Some of them are, and some of them are sold direct.

Mr. Davis: That's all. [229]

Redirect Examination

By Mr. Grigsby:

Q. Mr. Quarnstrom, was this $88.00 that you got an additional payment for potatoes that you had already sold, that were produced in '45?

A. Yes, that was the final payment on potato pool—1945 potato pool, final payment.

Q. So that there was more money paid for potatoes produced in '45 than shows on this statement of February 11? There was additional money paid to the farmer?

A. It would appear that way. I don't know; I am not acquainted with their books.

Q. Now, Mr. Davis suggested something to my mind: Could that have been entirely from potatoes that had been stored and not marketed, or was it for potatoes that had actually been sold by the co-op, and sold during '45?

A. You asking me that question?

Q. Yes.

A. I think likely that most of those potatoes were sold during '46. Maybe I shouldn't say most of them, but some of them about——

(Testimony of Clarence Quarnstrom.)

Q. Some of them sold in '46? A. Yes.

Q. Well, do you know whether yours were?

A. Well, they were pooled. My individual potatoes were not recognizable after they were put in a pool.

Q. No. I am getting at: What does this $88.00 represent? Does it represent an additional price for potatoes or some other potatoes you hadn't gotten anything for?

A. It represents additional payment for total number of potatoes I delivered in '45. [230]

Mr. Grigsby: That's all.

Recross-Examination

By Mr. Davis:

Q. Mr. Quarnstrom, fact of the matter is that the co-op sold some potatoes to Canada early last year, do you remember that?

A. They sold some of them, I imagine.

Q. Some they had in storage and hadn't been able to dispose of before that time?

A. That's right. Well, they had been put in a pool in '45 and they cleaned out the pool in the spring of '46.

Q. Yes. In other words, these were some additional sales of 1945 potatoes that probably the sales hadn't been made up at the time the report was made, isn't that it?

A. That's right. Evidently, that was after the potatoes had all been sold they divided the profits

(Testimony of Clarence Quarnstrom.)
in the potato pool and prorated them back to the farmer again, or else it was profits from the co-op. I wouldn't say.

Q. Out of that you got some $88.00? That's all.

The Court: That is all. Another witness may be called.

Mr. Grigsby: Mr. Ising.

The Court: You may be sworn, then we will take a recess.

(Witness sworn.)

The Court: Court will stand in recess until 3:23.

(Whereupon recess was had at 3:13 o'clock p.m.)

After Recess

The Court: You may proceed, Mr. Grigsby.

WILHELM ISING

heretofore duly sworn, testified for and in behalf of the plaintiff as follows:

Direct Examination

By Mr. Grigsby:

Q. State your name, please?

A. Wilhelm Ising.

Q. You are the William Ising named in this lawsuit? A. Yes, sir.

Q. When did you start selling milk to the co-op, Mr. Ising?

(Testimony of Wilhelm Ising.)

A. Well, I start selling first when—when the creamery start in we were shipping cream first, and then we were shipping milk, and I think it was the ninth of December, 1942, when I had my graded barn and establishment, when it started shipping Grade A milk—the ninth of December, 1942.

Q. Well, had you sold milk to the co-op before that? A. Yes.

Q. And from what year?

A. I think it's about a year or two before, if I ain't mistaken.

Q. Now, you sold in '42, '43, '44 and '45—'46?

A. Yes.

Q. And now? A. Yes.

Q. Now, how were you paid for your milk sold in '42 and from then on?

A. Well, I got paid twice a month, on down payments.

Q. And after that?

A. Afterward we received the balance according to the profit was made on the end of the year. [232]

Q. According to the profit that was made?

A. That was made——

Q. Now, did you ever, during any of those years, sell any milk to it—outright to the co-op—at a fixed, final price? A. Not that I know of it.

Mr. Davis: I didn't hear your answer, sir.

The Witness: I said, not what I know of it.

Q. (By Mr .Grigsby): Mr. Ising, you heard the testimony of Mr. Quarnstrom with reference to a

(Testimony of Wilhelm Ising.)

meeting between you dairy farmers interested in this law suit? A. Yes.

Q. And some members of the Board of Directors of the co-op? A. Yes.

Q. Sometime last March or April?

A. Yes.

Q. Were you present at that meeting?

A. Yes.

Q. Do you know who put the question to Mr. Stock that was testified about? A. I did.

Q. Do you remember what your question was?

A. Well, I asked the Board, I asked: "Now, you Board of Directors, do you admit that we have this money coming what is—this $57,000?" And Mr. Stock says: "Yes," and I think it was Mr. Eckert, he says: "Where we going to get the money?"

Q. "Where are we going to get the money?"

A. Yes, he didn't know where he would get the money.

Q. Did any of the members of the Board deny you had the money coming?

A. No, they didn't.

Q. Oh, Mr. Ising, did you sell vegetables also in the year 1945? A. No. [233]

Mr. Grigsby: Take the witness.

The Witness: I'm not quite sure. I think we did some of it. I think we did.

Q. That is, you did?

A. Yes; very little, though.

(Testimony of William Ising.)

Q. What's that?

A. I think it was a very little.

Q. Do you know whether you received any additional payments for your potatoes that you produced and delivered in '45—payments in '46?

A. Yes, I did. I think I furnished—I think 72 bags of potatoes and I don't remember exactly what I got on down payment on it, but at the end of it I got, I think it was around $12.00 I think I got paid at the end of it for the potatoes.

Q. Additional?

A. I—something like that. I don't remember exactly the penny, but it was around $12.00 what I got paid to the end of it.

Q. You mean after the season was closed?

A. After the pool was closed.

Mr. Grigsby: That is all.

Mr. Davis: No questions, Mr. Ising.

The Court: That is all. Another witness may be called.

Mr. Grigsby: Mr. Johnson.

ARVID JOHNSON

being first duly sworn, testified for and in behalf of the plaintiff as follows:

Direct Examination

By Mr. Grigsby: [234]

Q. State your name, please?

A. Arvid Johnson.

Q. Are you one of the claimants in this case?

A. Yes.

Q. How long have you sold milk to the co-op defendant?

A. Since the winter of 1940.

Q. And under what system of payment have you sold and delivered milk to the defendant corporation?

A. Well, my understanding was when we come in here, everything was sold on a pool basis.

Q. And that is from the time that you first sold milk?

A. From the time I came into the country.

Q. And when was that? A. 1935.

Q. Now, with reference to milk: In 1944, it is in evidence here, that additional sums of money—you call them payments—were paid to the milk producers for the product of 1943. That was true in your case, was it? A. That's right.

Q. Now, did you receive additional payments in 1943 for the '42 production? A. Yes.

Q. And how far back did that go?

(Testimony of Arvid Johnson.)

A. If I recall, I think we received money in 1941 and also in 1944—that is, up to 1944.

Q. For the production of the previous year?

A. That's right.

Q. And in '45 you received money for the '44 production? A. Correct.

Q. In addition to the down payments?

A. Yes.

Q. But in '46 you didn't get anything for '45 production? A. That's right. [235]

Q. That's what we are suing for now. Did you sell produce also—vegetables?

A. Pardon—which year?

Q. In '45? A. I sold some potatoes.

Q. What's that? A. Potatoes.

Q. What quantity?

A. Oh, neighborhood of about 12, 13 ton.

Q. Now, I will ask you whether, for the potatoes that you produced in '45, in addition to what you got on delivery, you received further payments made in '46? A. That's right.

Q. You did? Do you know how much a ton?

A. I think it was 57/100 of a cent on a pound.

Mr. Grigsby: 57/100 of one per cent? Take the witness. Wait a minute. Were you present at any of these meetings that have been testified about?

A. Yes.

Q. Were you present at the meeting some years ago in the fall of 1942, or thereabouts, when a discussion was had with the Directors about the price of milk? Were you present at that meeting?

(Testimony of Arvid Johnson.)

A. Yes.

Q. And was there a discussion there about reducing the advance? A. That's right.

Q. Go ahead, now, and tell the Court what you heard there, as near as you can.

A. Well, on that meeting we were getting paid at a butterfat price of $1.10 and their intention at that time was to reduce it to a dollar. One of our directors, or the general manager, made the statement that it didn't make any difference because at the end of the year we would receive all the [236] overages that was made by the dairy.

Q. You mean the profits or overage?

A. The profits.

Q. Excuse me for being leading. Was that about the time of that meeting, fall of 1942, close of the season?

A. Well, I couldn't say right off hand exactly the date, but it was in '42.

Q. Now, did you attend this other meeting that was testified about? A. Yes.

Q. Last March or April?

A. That's right.

Q. Did you hear the question put to Mr. Stock that has been testified about?

A. That's right.

Q. Will you state your recollection of what occurred there at that time?

A. Well, my recollection is about the same as your other two witnesses.

(Testimony of Arvid Johnson.)

Q. Well, just state it in your own words, then, as near as you can.

A. Well, as near as I can state that, is like Mr. Ising: He asked Mr. Stock in regards to—if he—or if the Board felt that they owed us this money and they said they did and one of the members also stated that, "How are we going to pay?"

Mr. Grigsby: That is all. Take the witness.

Mr. Davis: Just a second, your Honor.

Cross-Examination

By Mr. Davis:

Q. Now, Mr. Johnson, isn't it a fact that there were no additional payments made in 1940 or 1941 or 1942 to the milk dealers?

A. That is very true. There was no additional payments [237] in '40. I don't recollect if there was in '41.

Q. Well, now, we all know there were in 1943—that is, in '44 for '43, and in '45 for '44. We know that. Do you recall any other years besides those two in which extra payments were made?

A. Yes, I do.

Q. What year was that?

A. Well, I haven't got the record of it, but there was one in '44, one in '43, one in '42 and one in '41, and I received—if you want to hear the figures, I received $750 in '41, and a thousand and 80, if I recall, in '42, and the others amounted to over $2,500 on the following two years.

(Testimony of Arvid Johnson.)

Q. Now, that is in addition, is it, to this bi-monthly payment?

A. That is the finals of the pools.

Q. Now, when you sold milk all these years, did you sell it as these other boys testified here? You got a check once every two weeks on the milk that you had delivered in the previous two weeks?

A. That's right.

Q. And you say all years since 1941, then—you are not sure about 1941—but all years since then you have received additional checks?

A. I have received additional checks for four years, from '44 back—or that is, up to the end of '44.

Q. '44, '43, '42, '41? A. That's right.

Q. All right. Do you recall who was present at this meeting in the fall of 1942 in which you had this discussion you testified about?

A. Pardon? Who was president?

Q. Who was present? Who was there?

A. It was composed of [238] dairymen and I think the manager of the Association.

Q. And who was the manager of the Association at that time? A. L. C. Stock.

Q. Were the Board of Directors present?

A. That I couldn't answer.

Q. You have particular recollection of Mr. Stock being there?

A. I have, and the creamery manager was there.

Q. And was this a meeting of the Board of

(Testimony of Arvid Johnson.)

Directors or a meeting of the milk producers, do you remember?

A. A meeting of the milk producers.

Q. At which Mr. Stock was present and the creamery manager was present?

A. That's right.

Mr. Davis: That is all, Mr. Johnson.

Redirect Examination

By Mr. Grigsby:

Q. Mr. Johnson, have you any of the slips showing these additional payments with you?

A. I have for 1943 and '44. (Handed to Mr. Grigsby.)

Q. And here is one dated September 10, '45.

A. Well, that's for '44.

Q. Now, do you know—here is one undated for a thousand and 47 dollars. Do you know for what year that was? A. Two of these are for '44.

Q. All right, this one for $1182 is for milk produced in '43, is it?

A. That's right—these two. [239]

Q. And this '43 also?

A. Them are the second and final payments.

Q. For '43? A. This is for '44.

Q. And this one for '44?

A. No, both of these.

Q. I mean, this one and the one dated?

A. Yes.

Q. This check here, reading: "Second payment

(Testimony of Arvid Johnson.)

on milk pool: 20% of dollar value $6187.25''; now, do you remember when you got that—what year?

A. Well, that was paid, I believe, in April of 1945 and the other one was paid along in September, 1945.

Q. Now, there must have been a first payment prior to that, then?

A. Well, your first payment is what you get every two weeks.

Q. Oh, I see. Now, these two, the white one and the one for the amount of 1237, are for '44 production? A. That's right.

Q. The other two for '43 production?

(Witness nodded.)

Q. I am going to ask that these be admitted in evidence. They are similar to these others.

Mr. Davis: Those are two for the one year and two for the other?

(Mr. Grigsby handed slips to Mr. Davis.)

Mr. Grigsby: If the Court please, may I state to Mr. Davis that the witness testified that the down payment was that first one and this is the second payment and final one.

Mr. Davis: No objection.

The Court: It may be admitted. Do you wish to have four separate exhibits? [240]

Mr. Grigsby: Mark this the next number. (Handed to Clerk.)

(Testimony of Arvid Johnson.)

The Court: The next is No. 10. What will that be?

Mr. Grigsby: That includes two slips showing payments for production of 1943——

The Court: All right.

Mr. Grigsby: ——made in '44. This is——

The Court: No. 11 is two slips?

Mr. Grigsby: Would that be No. 11?

The Court: The next one is No. 11.

Mr. Grigsby: No. 11 would be slips showing payments made in '45 for '44 production.

The Court: Very well, they may be admitted and appropriately marked.

(Plaintiff's Exhibits Nos. 10 and 11 admitted in evidence.)

PLAINTIFF'S EXHIBIT NO. 10

Remittance Advice—No Receipt Required
Matanuska Valley Farmers Cooperating Association

Date of Invoice	Description	Gross Amt.	Discount or Deduction	Net Amt.
	Final payment—milk and cream pool			
	Total amount purchased $5237.20			
	22.579% of "Dollar Value" purchased	$1182.51		
	Less 2% statutory reserve	23.65		
	Final payment			$1158.86
*	* * * * * *			
	Second milk pool advance:			
	Total amount purchased $5237.20			
	20% of dollar value purchased	$1,047.44		
	Less 2% statutory reserve	20.95		
	Amount of second advance			$1026.49

[Endorsed]: Filed August 5, 1948.

(Testimony of Arvid Johnson.)

PLAINTIFF'S EXHIBIT NO. 11

Johnson, Arvid — Final Payment on Milk Pool September 10, 1945

Total dollar value production $6187.25 x 21.125% $1307.05
Less 2% S.R. 26.14
Net amount of draft $1280.91

* * * * * * * *

Remittance Advice—No Receipt Required
Matanuska Valley Farmers Cooperating Association

Date of Invoice	Description	Gross Amt.	Discount or Deduction	Net Amt.
	Second payment on milk pool 20% of dollar value $6187.25 x 20%	$1237.45		
	Less 2% reserve		$24.75	$1212.70

[Endorsed]: Filed August 5, 1948.

Mr. Grigsby: That's all.

The Court: That is all, Mr. Johnson. Another witness may be called.

Mr. Grigsby: I would like to ask Mr. Ising, from where he sits, if these are your slips?

Mr. Ising: Yes.

Mr. Grigsby: For '43 and '44?

Mr. Ising: Yes.

Mr. Grigsby: Have you any for previous years?

Mr. Ising: No. [241]

The Court: He had better come up here.

Mr. Grigsby: I would like to recall Mr. Ising.

The Court: You may come up here, Mr. Ising, and take the witness stand. Counsel may come up here if he wishes.

WILHELM ISING

heretofore duly sworn, resumed the stand and further testified as follows:

Direct Examination

By Mr. Grigsby:

Q. Mr. Ising, will you look at these slips? What is that one you have—that white one?

A. This is: "Total Dollar Value Production $4158.28." And the last——

The Court: Speak up, Mr. Ising.

The Witness: It says here: "Final Payment on Milk Pool, September 10, 1945."

Q. (By Mr. Grigsby): Well, you needn't read the rest of it unless Mr. Davis insists. Now, when did you get that money?

A. This here, we got that late——

Q. Well, did you get it on the date it says?

A. Yes.

Q. Was that for '44 production?

A. Yes. I think it is—I am pretty sure it is.

Q. Well, was it the production of the previous year? A. This year?

Q. Of the previous year? Now, this final payment on milk pool, September 10, 1945—was that a final payment for milk—— [242]

A. No, that was when I received it.

Q. Well, for the milk sold in '44?

(Witness nodded.)

Mr. Grigsby: We offer this in evidence and ask that it be marked Plaintiff's Exhibit No.— —

The Court: 12.

(Testimony of Wilhelm Ising.)

Q. (By Mr. Grigsby): Now, have you any there for any production in '42?

A. I got another one here, I guess, for the same year. Says: "Second payment on milk pool, $831.66."

Q. Is that for '44 production?

A. I think it is.

Mr. Grigsby: I ask that it be marked Plaintiff's Exhibit 13. (Handed to Mr. Davis.)

Mr. Davis: I would like to see 12, too.

Mr. Grigsby: May I have these marked, your Honor, as one exhibit?

The Court: They may both be marked as Plaintiff's Exhibit No. 12. That is two slips for 1944, is that right?

Mr. Grigsby: Yes, paid in '45.

(Plaintiff's Exhibit No. 12 admitted in evidence.)

PLAINTIFF'S EXHIBIT NO. 12

Remittance Advice—No Receipt Required
Matanuska Valley Farmers Cooperating Association
Palmer, Alaska

Date of Invoice	Description	Gross Amt.	Discount or Deduction	Net Amt.
	Second payment on milk pool			
	20% of dollar value $4158.28 x 20%	$831.66		
	Less 2% reserve		$16.63	$815.03

* * * * * * * *

Ising, Wilherm — Final Payment on Milk Pool
September 10, 1945

Total dollar value production $4158.28 x 21.125% $878.43
Less 2% S.R. 17.57
Net amount of draft $860.86

[Endorsed]: Filed August 5, 1948.

(Testimony of Wilhelm Ising.)

Q. (By Mr. Grigsby): Now, have you anything there for '43?

A. Yes, there's one here; it says: Final payment on cream or milk pool. Here's the first one; here's another one—it says: Second milk pool advance. This one is $779.17, and the other one—the second one—is $690.17.

Q. And do they both appear to be a percentage of the same [243] amount, 3450.85?

A. Yes. Yes, I think—I am pretty sure.

Q. Do you know for what year's production that was?

A. That must have been for '43.

Mr. Grigsby: We offer these as one exhibit.

The Court: They may be marked as Plaintiff's Exhibit No. 13 and received in evidence.

(Plaintiff's Exhibit No. 13 admitted in evidence.)

PLAINTIFF'S EXHIBIT NO. 13

Remittance advice—No receipt required
Matanuska Valley Farmers Cooperating Association
Palmer, Alaska

Date of Invoice	Description	Gross Amt.	Discount or Deduction	Net Amt.
	Final payment—milk and cream pool			
	Total amount purchased $3450.85			
	22.579% of "dollar value" purchased	$779.17		
	Less 2% statutory reserve	15.58		
	Final payment			$763.59

* * * * * * * *

(Testimony of Wilhelm Ising.)

Second milk pool advance:		
Total amount purchased $3450.85		
20% of "dollar value" purchased	$690.17	
Less 2% statutory reserve	13.80	
Amount of second advance		$676.37

(Wm. Ising)

[Endorsed]: Filed August 5, 1948.

Mr. Grigsby: Now, have you another slip there?

A. I got one more here—this one. There's no date put here—it's just a stub taken off from the check, but I am pretty sure it is from the year before, 1942. It says $605.55.

Q. Now, it is dated here. A. Is it?

Q. 4/24/43.

A. '43—well, that's when we got it paid. That must have been paid for that year '42—three, four, that's right.

Q. Well, now, you never did get similar slips to this when you delivered your milk, or every two weeks?

A. No. No, this is for when we—the milk pool got closed on the end of the year, and what was made by the dairy—that's our last milk payments.

Q. Now, I'll call your attention, Mr. Ising: This reads: "Date of Invoice, 4/24/43." That would be April 24, '43. "Final payment on milk pool, $605.55." Now, would that be for the final payment on milk sold during the previous year—previous to '43? A. Well, I guess it is. [244]

(Testimony of Wilhelm Ising.)

Q. Well, you never got any of those currently, did you, as you went along? A. No. No.

Q. Well, don't you know whether it was?

A. No. We never got them. We just got them on the end of the year when the year—when the books was closed, I guess in November, and afterwards when we had our main meeting, then we got these.

Mr. Grigsby: I ask that this be marked Plaintiff's Exhibit 14.

The Court: It may be admitted, without objection.

(Plaintiff's Exhibit No. 14 admitted in evidence.)

PLAINTIFF'S EXHIBIT NO. 14

Remittance Advice—No Receipt Required
Matanuska Valley Farmers Cooperating Association

Date of Invoice	Description	Gross Amt.	Discount or Deduction	Net Amt.
4/24/43	Final payment on milk pool 2259.13# butterfat @ .26804			$605.55

(Wm. Ising)

[Endorsed]: Filed August 5, 1948.

Mr. Grigsby: That's all, Mr. Ising.

The Court: Is there any further cross-examination?

(Testimony of Wilhelm Ising.)

Cross-Examination

By Mr. Davis:

Q. Did you say, Mr. Ising, that you didn't get slips as you sold your milk, every two weeks?

A. We always get a slip, but not like these.

Q. Not a slip that says "final payment" or anything like that? But you did get a slip right along, didn't you?

A. Yes, we get a slip that says how many pounds of milk I delivered, what test I got and the price of it and the amount of money.

Q. Do you have any of those slips?

A. I might have one, I am not sure, but I know I got them out home. No, I don't think so. [245]

Mr. Davis: Thank you, Mr. Ising, that's all.

Mr. Grigsby: Mr. Cope.

The Court: Mr. Cope may be sworn.

JOHN LYLE COPE

being first duly sworn, testified for and in behalf of the plaintiff as follows:

Direct Examination

By Mr. Grigsby:

Q. State your name, please?

A. John Lyle Cope.

Q. Are you one of the complainants in this case?

A. I am, sir.

Q. How long have you sold milk to the defendant corporation? A. Since 1939.

(Testimony of John Lyle Cope.)

Q. And do you know how many years back you can testify to that you have sold milk and received a payment or amount of money as delivered every two weeks, and subsequently further payment?

Mr. Davis: I object to the question; it is improper.

Mr. Grigsby: All right. Go ahead and tell how you sold your milk?

The Court: Go ahead and answer.

The Witness: We sold our milk according to contract, that is, Paragraph No. 7. It was our understanding, anyway—an advance price of so much—that varied. Sometimes they raised the price of milk during that time, but it was paid to us as an advance, and at the end of the year after the cost—a reasonable cost for handling charges—from other overhead of other different departments— [246] and I believe it is based upon the dollar value of the amount of business that is done in each department, and that is prorated over the whole thing, and then what is left, according to our audits, at the end of the year—up until 1945—we received this additional advance payment and also the final payment.

Q. Now, for what year did they first commence using that system—for what year's production?

A. Well, I think without a doubt that the books will show that I have received a dividend—or a—not a dividend, but a payment—a final payment—the milk pool every year the co-op has operated up there starting under Mr. Stock's management, and

(Testimony of John Lyle Cope.)

I am positive in my own mind, although I have no record—I might get that record from the ARRC —that we received one payment in 1939. It was a very small payment.

Q. For a previous year's production?

A. Yes, sir. Now, I don't say that that was an overage—I wouldn't say—but we did receive either a dividend or an overage.

Q. Well now, for the production of 1940, can you state whether or not you received additional payments in '41?

A. No, I can not testify to that, but I believe that I did.

Q. Now, for the production of 1941, can you say whether or not you received additional payments in '42?

A. I believe that I did. I have no record to show. It probably is on the corporation books—or the co-op books—that I did.

Q. Well now, in 1943 did you receive any additional payments [247] for milk you sold and delivered in '42? A. I believe I did.

Q. Have you any slips there with you?

A. Yes, sir. Yes, I received final payment on milk pool, 3556.39 pounds of butterfat—I believe that's—$953.26. That is for the year—the check was made out in '43, but it is '42 production.

Q. The check is made out here on the date 4/24/43? A. That's right.

Mr. Grigsby: We offer this in evidence and ask that it be marked.

(Testimony of John Lyle Cope.)

Mr. Davis: Is that a similar slip to the one Mr. Ising had for the same year?

Mr. Grigsby: Yes.

Mr. Davis: No objection.

The Court: It may be marked Plaintiff's Exhibit No. 15.

(Plaintiff's Exhibit No. 15 admitted in evidence.)

PLAINTIFF'S EXHIBIT NO. 15

Remittance Advice—No Receipt Required
Matanuska Valley Farmers Cooperating Association

Date of Invoice	Description	Gross Amt.	Discount or Deduction	Net Amt.
4/24/43	Final payment on milk pool 3556.39# butterfat @ .26804			$953.26

[Endorsed]: Filed August 5, 1948.

Q. (By Mr. Grigsby): What other slips have you there?

A. I have two others here for the same year. There is no date, but I believe it is for '44 production.

Q. '44 or '43 production?

A. I believe it's '44. I am not positive. It is either '43 or '44.

Mr. Grigsby: All right, we offer them in evidence.

The Court: If there is no objection they will be

(Testimony of John Lyle Cope.)

admitted as Plaintiff's Exhibit No. 16, the two together.

(Plaintiff's Exhibit No. 16 admitted in evidence.) [248]

PLAINTIFF'S EXHIBIT NO. 16

Remittance Advice—No Receipt Required
Matanuska Valley Farmers Cooperating Association

Date of Invoice	Description	Gross Amt.	Discount or Deduction	Net Amt.
	Final payment—milk and cream pool			
	Total amount purchased $5766.21			
	22.579% of "dollar value" purchased	$1301.95		
	Less 2% statutory reserve	26.04		
	Final payment			$1275.91
*	* * * * * * * *			
	Second milk pool advances:			
	Total amount purchased $5766.21			
	20% of "dollar value" purchased	$1153.24		
	Less 2% statutory reserve	23.06		
	Amount of second advance			$1130.18

[Endorsed]: Filed August 5, 1948.

Mr. Grigsby: Did you say what year?

A. I believe those are for the year '44; it might be '43.

Mr. Grigsby: Take the witness.

Mr. Davis: No questions.

Mr. Grigsby: Now, I ask Mr. Davis: We had some conversation—I didn't have time to reduce this to writing, but I ask whether or not counsel

will stipulate that the remaining claimants will testify in substance that for the year's production commencing with '42 and '43 up to and including '44, they have, after the close of the year, received substantial sums of money as second and final payments—in substance as these witnesses who have been on the stand have testified?

Mr. Davis: I will, subject to the provision that, possibly, some of your men were not operating that far back, I don't know. I am willing to stipulate, your Honor, that any of the assignors who were selling milk as far back as 1942 would testify as Mr. Cope and Mr. Rempel and Mr. Quarnstrom have testified as to how their payments were made. Is that what you wanted?

Mr. Grigsby: Yes. That is to save the trouble of bringing that many more witnesses in here from Matanuska.

The Court: Very well, the record will so show.

Mr. Davis: That stipulation will be something to the effect that they received payments biweekly, based on the amount of milk sold at such and such a fixed price, once again not saying the price was to be the final price, but on a fixed basis, and then [249] at the end of each year received additional payments. That is what you wanted?

Mr. Grigsby: Now, I will ask the defendant corporation if they can bring the figures in showing what total of additional sums paid to farmers in 1946, for produce sold in '45? Have you those figures?

Mr. Davis: Would that be produce sold in '45? Some of those, I understood, weren't paid until '46.

Mr. Grigsby: Not finally marketed, but sold by the farmers.

Mr. Davis: Oh, sold by the farmers? All right.

Mr. Grigsby: If the Court please, it is after four.

The Court: Very well, the trial will be continued until tomorrow morning. Do counsel and the parties want to begin before ten o'clock?

Mr. Grigsby: It is pretty hard for them to get in before ten o'clock.

The Court: Very well, continued until ten o'clock tomorrow morning. Anything else?

Mr. Davis: Your Honor, as I previously mentioned, I plan to leave here on Wednesday noon for Seattle and plan to be gone about a week. Now, I don't intend at this time to have the defendant's case take very long. I am wondering how much longer Mr. Grigsby is figuring his witnesses will take?

Mr. Grigsby: Well, with the exception of one more claimant whose testimony I would like to have in, it is covered by the [250] stipulation, but I expect to call one witness to testify along the lines the others have and also to recall Mr. Snodgrass briefly and to call Mr. Stock. I think I can finish by noon, unless the defendant——

Mr. Davis: Well, since you have called Mr. Snodgrass and you have called Mr. Allyn, and you intend to call Mr. Stock—in general, your Honor, that will be the defendant's case here. We also intend

to call Mr. Eckert; possibly one or two other witnesses, briefly. But if Mr. Grigsby can be through by noon tomorrow, I think we certainly can be through by four o'clock. At least, I hope we can.

The Court: Perhaps the number of witnesses present will be so reduced, if necessary, we can continue on late enough tomorrow to put in all the testimony.

Mr. Davis: I would like, if possible, to clean up the testimony tomorrow because I plan to be gone the following day and, of course, as far as argument goes, I expect we can take care of that at a later date when these parties don't need to be here.

The Court: Well, the Court will be glad to accommodate the parties and counsel. If nothing further, court will stand adjourned until tomorrow morning at ten o'clock.

(Whereupon adjournment was had at 4:05 o'clock p.m.)

(On Tuesday, April 8, 1947, the following proceedings were had:)

Mr. Grigsby: Is Mr. Allyn here? Well, will Mr. Snodgrass [251] take the stand?

The Court: Mr. Snodgrass may resume the witness stand.

ROLAND SNODGRASS

heretofore duly sworn, resumed the witness stand and further testified as follows:

Redirect Examination

By Mr. Grigsby:

Q. Mr. Snodgrass, it was testified to here the other day, I believe, by Mr. Allyn, that in 1944, after the additional payments for 1944 milk had been paid to the farmers, there was a remaining balance, I believe, of some 18,000 and some odd dollars still on the books as net profits of the dairy-creamery. Do you remember that?

A. Well, I would remember this much: There was a balance left.

Q. There was for '44?

A. Yes, that's right.

Q. It was about $18,000?

A. I believe that was substantially it.

The Court: It was about what, Mr. Grigsby?

Q. (By Mr. Grigsby): Something in excess of $18,000. Now, I will call your attention to his testimony to the effect that for '45 operations it was estimated that the creamery branch of the dairy-creamery business made about $20,000 profit. Do you remember that testimony?

A. I don't recall that exactly, but I have seen the sheet on which he worked it out. I believe that's about right. [252]

Q. I mean, you believe that's about what he testified to? A. Yes, I believe so.

(Testimony of Roland Snodgrass.)

Q. Now, do you know yourself anything about what the creamery made in net profit in '45?

A. All I would know myself is from seeing the audit which I have seen just for a short time and from Mr. Allyn's working papers.

Q. Well, Mr. Allyn wasn't here at that time?

A. No. You see, his papers are summary of work done previously.

Q. Do you know as a matter of fact whether the creamery made anything?

A. Well, the creamery operations, the way they were conducted, must have made a profit. The audit furnished by Neill, Clark and Company shows that the combined creamery and dairy made a profit, so I would assume that the creamery made a part of that profit. You are speaking of the creamery as separate from the creamery and dairy, don't you?

Q. You just assume it, but you don't have any figures to show it?

A. Except the figures of the audit and the breakdown made by Mr. Allyn.

Q. Well, Mr. Allyn hasn't produced any such audit and breakdown in court, to your knowledge, has he?

A. I couldn't recall that. I don't know.

Q. Now, on Page 3 of the audit of 1945 operations there is an item of comparison of the two periods, 1945 and 1944: "1945, Dairy-Creamery" net profit, "$57,001.58; 1944, $18,943.42." And then under the heading of "Increase," increase of dairy-creamery [253] $38,058.16, apparently showing an

(Testimony of Roland Snodgrass.)

increase of the net profits of the dairy and creamery of $38,000 and a little over for the operations of 1945 over those of '44. And then there is a note: "After giving effect to additional payments to milk and egg producers of $47,528.40"; that is for 1944. So, as a matter of fact, there wasn't an increase in profit in 1945 over '44, was there?

A. That's right, there was not.

Q. In other words, the net profit in '44 was 18,943 plus 47,528, or about 66,000?

A. I believe that's correct, yes.

Q. So that there was left remaining there to the credit of the net profits of the dairy-creamery for the year 1944 the sum of $18,943.42? Now, you were manager at that time: Do you know what use was made of that money?

A. Of that 18,000?

Q. Yes.

A. Well, specifically, that money, I don't know, but I know what should have happened to it.

Q. Well, what should have happened to it?

A. What should have happened to it was whatever percentage or whatever part of that per cent in the total profits of the Association as a whole would go over into the balance sheet as undivided profits and then would later be set up on certificates of equity, which would be paid back to the producers, although it might not necessarily be in that department.

Q. Well now, do you know on what basis that they paid the milk producers and egg producers,

(Testimony of Roland Snodgrass.)

that is, the dairy and creamery, additional payments of $47,528.40 out of this net profit of something over $66,000, and held out the $18,000? How do they get at the figure of holding out $18,000? Was it arbitrary?

A. Well, as I think I have said before, there is something arbitrary in it; it isn't altogether arbitrary, but as I explained before, the net profits of the Association that year—in 1944—this is the year we are talking of, isn't it?

Q. Yes, sir.

A. The net profits of the Association were some $57,000.

Q. In '44? A. In '44.

Q. Well, the net profits of 47,000 in '45, dairy-creamery—66,000 for dairy-creamery in '44?

A. Yes, but I was referring first to the net profits of the Association in '44.

Q. Well, on Page——

The Court: Pardon me, Mr. Grigsby, is there another copy of that statement available?

Mr. Grigsby: Yes.

Mr. Davis: There is one in evidence, your Honor.

The Court: All right, let me see the one in evidence.

Mr. Davis: There is also one of the '44 in evidence.

The Court: Well, I would like to see one copy. Mr. Grigsby has the exhibits, I understand.

Mr. Grigsby: Here is the copy of '45.

(Testimony of Roland Snodgrass.)

The Court: May I see the one you are inquiring from now?

Mr. Grigsby: That's the one. Now, on Page 4 —which is a long sheet, your Honor—— [255]

Mr. Davis: If Mr. Grigsby is going to inquire of particular figures of Mr. Snodgrass, I believe Mr. Snodgrass ought to have a copy himself.

The Court: I think so, too.

Q. (By Mr. Grigsby): Well, he should have one whenever he requires it. Page 4 of the audit of 1945 operations shows a comparison of the net profit of the whole co-op for '45 and '44, total 1945, in the last column, net profit is $2,889.27. That includes the rents from the dairy down here in town, which puts them over the top. You understand that, don't you—you got those figures before you?

A. Yes; I don't find the $2,000 just as yet—the last column?

Q. The last column at the bottom of the column: "Net income for the year, $2,889.27.

A. Yes, I have that now.

Q. And for '44 it is $11,946.72?

A. That's right.

Q. And so that would be the co-op profit for '44, after them—assuming that they were entitled to that $18,000? A. I believe that is correct.

Q. Now, will you tell me, if you can tell me, on what basis they paid the farmers $47,000 additional payments for '44 and held out $18,000 from the milk farmers? What did that $18,000 represent?

A. Well now, as I understand it, Mr. Grigsby,

(Testimony of Roland Snodgrass.)

the $18,000 was not determined specifically by itself. It was the balance left over by subtracting what had been determined to have been the part of the Association earnings earned on milk [256] and milk products sold.

Q. You mean the part that they earned in the creamery? A. No. See——

Q. Well, that's what I am getting at.

A. You see, the $18,000 is not determined directly. It isn't the prime figure. It is the balance left over of the shown creamery earnings after—starting with this process, the net profits of the Association were so great. The determination which is made is the part of those profits which were made on milk and dairy products, and by milk and dairy products—I mean, milk and milk products—and the $18,000 is arrived at—that particular figure was the $47,000. The $18,000—it isn't the figure that is desired. The $47,000 is the figure that is worked toward. Then by substracting that—the $47,000 from the departmental earning, as shown by this breakdown here—you get an $18,000 balance.

Q. Now, Mr. Snodgrass, the figure 18,000 odd dollars that we are talking about is what is left after deducting from the net profits of the dairy-creamery of 66,000 some odd dollars the sum of 47,000 some odd dollars additional payments?

A. I think that is correct. The $18,000, however, is not a pertinent figure. It isn't a figure which——

Q. It is what is left after making those payments?

(Testimony of Roland Snodgrass.)

A. That is right. It is a paper figure which is left after making those payments.

Q. I will call your attention to Page 16—Schedule 6, Page [257] 16—near the middle of the page is item (3), "20% additional payment to milk producers, 22,563.31"; " 21.125%" payment to milk producers—"additional payment to milk producers, 23,355.89"; and further down: "Additional payment to egg producers, 1,609.20." I don't know if that is additional payments, but it is payments—but the total, 22 and 23, is 45,900 some dollars. Do you know what goes to make up the additional payments of 47? What makes that difference, as shown on Page 3: Additional payments to milk and egg producers, 27,528.40? A. 27,528.40?

Q. Yes, on Page 3?

A. Well, now, I may be incorrect in this, Mr. Grigsby, but if you will add just the thousands and hundreds I think you come, with those three items: 22,000 and 23,000 are 45,000, and the 1,000 of the egg production is 46,000. If you add the hundreds you have the 300, 500 and 600, which makes 1400, which brings you to 47,300 in those three items.

Q. Adding 23,563——

A. I just added the thousands and hundreds and I get 47,300.

Q. What sums did you add to get the 47,000?

A. If we skip all the tens and zeros, add 225, which is 22 and a half thousand——

Q. What's that?

(Testimony of Roland Snodgrass.)

A. I added just the first three figures in the top two, and the first two figures in that egg——

Q. Of what item?

A. In the 22,563——

Q. Yes?

A. That is 22 and a half thousand, approximately; and 22 and a third thousand is 45 and 8/10 thousand; to that if you add one and 6/10 thousands, which is—you get so and so which [258] is substantially the figure you wanted.

Q. The item: "Egg Producers," 1609.20—you include that? A. Yes.

Q. Was that additional payments to the egg producers? A. I believe it was.

Q. All right, now: The total of that sum, subtracted from the net profits of the creamery and dairy, is what gives this figure of 18,000 some odd dollars?

A. Might I ask: Where is that figure?

Q. Exactly? Well, it's Page 3—$18,943.42.

A. Yes, I believe that was the way that figure was derived.

Q. Now then, it is a fact, is it, it refers back to page 16? You have heard the witnesses on the stand who have put slips in evidence marked "20% additional payment on dollar value" and "21 and a fraction per cent"—you have seen those when I have offered them to Mr. Davis? A. Yes.

Q. Now, each one of the milk producers—every one of them—for their product of 1944, in 1945 received two additional payments, didn't they?

(Testimony of Roland Snodgrass.)

A. Yes, I think that is correct.

Q. And each one received the same percentage on what they had already received?

A. If they didn't they should have.

Q. One a payment of 20 per cent and a payment of 21 and 12 and a half hundredths per cent?

A. That is right.

Q. And after that was made, which totaled this $47,000, there was still 18,000 some odd dollars left, which is corrected to the [259] net profit of the dairy-creamery. Now, do you know how you determine these percentage payments? How did you decide to give them 20 per cent additional and then 21 per cent additional? Was that just arbitrary?

A. Well, as near as I can recall that—you know, where I always start—I start with the distributable earnings of the Association, and from that point, to determine where these earnings came from.

Q. Well, but you know where they came from, because you have got it in there in black and white?

A. Yes, but there were other departments furnished earnings.

Q. Yes, but you know what the egg and milk department had netted—you got it there before you, what you got from that unit?

A. That's right.

Q. And you paid them so much a pound as you got the milk. Then on a certain date in '45 after the audit is made, or before it is made but when you have your figures, you give them a 20 per cent additional payment, and then a 21 and 12½—on

(Testimony of Roland Snodgrass.)

what basis did you figure that? Or is it just you thought we will have that much and we are safe in giving them that?

A. All right, we will skip any starting point for a while. The second step in that is to try to split the creamery-dairy as nearly as possible into the dairy, which is said to be milk and include milk products, and the creamery, which is the other products manufactured mostly from supplies shipped in from the States—but the one, really, which handles the manufactured products is arbitrarily said to be the [260] creamery although, as we have mentioned before, it does get a certain amount of ungraded milk—and then by splitting off, actually, wherever is known the expenses—well, no, first—let's start: They both go on to sort of a profit and loss statement basis. The sales of milk, cream, buttermilk and cottage cheese are determined as nearly as possible accurately and those subtracted from the total sales of the creamery and dairy show, split off, first the milk sales determined by a process of addition, and the creamery sales which are really determined by a process of subtraction from the total sales of the department. Then the cost of goods sold, which is the second item: You see, it turns into what is in its way a profit and loss statement on the creamery and dairy except the creamery and cream products come from a process of subtraction from the total figures of the combined department. The cost of goods sold on the dairy part, which is the positive side of this—

(Testimony of Roland Snodgrass.)

the other one being the one determined by subtraction—the cost of goods sold is the one paid out for milk, and in this case for eggs, or any cream that might be bought from the farmer, and this is carried on down as far as it can by actual figures.

Then there comes—when you get into the point of splitting the labor, and in splitting the general overhead, you have, on the expense items, you have a hard one in which there is a certain element of arbitrary—well, there is an arbitrary element used in splitting that, inasmuch as both at Palmer and in Anchorage [261] —are you following this?

Q. Yes, I am trying to.

A. Both at Palmer and Anchorage we have the same men and women and the same buildings and the same heating and electrical equipment serving both. Well, they are serving both of these two halves that we are splitting this creamery-dairy into, really, just for the purpose of determining the profits made on milk, and the arbitrary elements get down in there where you have to split a man's labor and where you have to split the office labor and the insurance and the advertising—those things off into the two classes of production. So, the figures are exact so far as they can be carried down for the split of this department into two halves and the arbitrary element introduced into it is a matter of the best judgment of the accountant, the manager and the Board of Directors, as to what percentages of the expenses which are incurred—well, just an

(Testimony of Roland Snodgrass.)

illustration by one man who works on both milk and ice cream.

Q. Very well. Now, I asked you a while ago if this $18,000 that you held out—kept—had any relation to what the Board estimated the creamery made, and you said it did not?

A. Well——

Q. Now, did it, or is that what you estimated the creamery made?

A. By a process of subtraction, by a negative process of figuring the thing out—I said, what the creamery made there is shown by subtraction.

Q. Is what?

A. Is shown by subtraction.

Q. Now, you haven't got any figures to show what the [262] creamery made?

A. No. You see, we have the figures for the creamery and dairy and then we attempt to split them as far as possible.

Q. Now, please just answer the question. The question is: You haven't any figures to show what the creamery made?

A. I think that is correct.

Q. Now, at the present time, Mr. Allyn is working on a system so you will have for this year, isn't he? A. It is my understanding that he is.

Q. But you didn't have it then?

A. No, we did not have it then.

Q. You haven't got any figures to show of this milk that you bought from the farmers, for which you paid them $136,000 in '46—or no, as they sold

(Testimony of Roland Snodgrass.)

it, '45—you don't know what part of that went to the creamery?

A. Would you repeat that, please?

Q. You don't know what part of that milk went into the creamery?

A. I don't believe there are specific figures for it.

Q. You got no figures to show it?

A. I believe that's right.

Q. And you were in the same fix as to the '44 operation? A. And all previous.

Q. And so you had nothing to do but guess what the creamery part of your outfit made in '44?

A. Well, it's considerably better than a guess.

Q. Now, after the farmers sell their milk to this creamery down there, and after you buy powdered milk and extracts and [263] butter and whatever you use in making a product down there—from the time you buy the farmer's milk and these other things, then it is a co-op enterprise, isn't it—the co-op runs?

A. As I understand, the co-op runs the whole thing.

Q. Well, the co-op doesn't run Mr. McAllister's dairy, does it? A. Oh, no, no.

Q. Well, you run that creamery down there?

A. That's right.

Q. And you run the Meat Department, don't you? A. That's right.

Q. And the hotel and fountain, or whatever you call it? A. Yes, we lease the fountain.

(Testimony of Roland Snodgrass.)

Q. The garage? A. That's right.

Q. And on all those other things that the co-op runs in '45 you lost money, but you just want to estimate to the Court that you made money on this creamery that you run, without any figures to show that you made a dime? You haven't got any figures to show you made a cent, have you?

A. Well, as I said, it is a great deal better than a guess. There are figures as far as possible to show specifically the specific expenses of the two—of the creamery and dairy parts of the whole, so far as they can be carried down.

Q. But you can't say, for instance, what you made on ice cream mix, can you?

A. No, because there has never been any point in determining that which would justify the expense of determining it. [264]

Q. Well, you have figures, haven't you, as to how much ice cream mix you sold to the Fort out here?

A. Yes, but I doubt if they have ever been added up. The basic figures are there.

Q. It was a large amount?

A. Yes, it was a large amount.

Q. And you didn't make any money on it, did you?

A. Well, that is quite a conclusion. We did.

Q. Well, you don't know, do you?

A. What do you call knowing?

Q. Well, do you know whether you made any

(Testimony of Roland Snodgrass.)

money selling ice cream mix to the Fort out here, or anywhere else?

A. Well, we know that we made money on that as well as we know we made money on milk because of this one particular thing: It does not take much more equipment, though the gross profit—that is, the cost of the goods sold with relation to the sales price—is the same in ice cream mix and considerably more on ice cream, and so we know we made money in both parts of it.

Q. Now, Mr. Snodgrass, you know what you paid the farmers for their milk, don't you?

A. That's right.

Q. And you got figures for it?

A. That's right.

Q. And you know what you got for the milk?

A. I believe that is correct.

Q. In town here, don't you? And you got the figures there what it cost you to handle that—something like $83,000?

A. Well, as Mr. Allyn said, that particular figure is not by an accounting system determined to show the cost of handling milk.

Q. Oh, yes, it is—the handling of the milk and the dairy [265] products—it is $83,000—you have got that. You have got every item, haven't you, in what you made out of the milk, but you haven't any item to show what your creamery made?

A. You know the reason, don't you?

Q. Because you didn't have the system you are inaugurating now?

(Testimony of Roland Snodgrass.)

A. Yes, but there has been a reason for keeping one-half of it and not the other half.

Q. All right, I don't care what your reasons are. The fact is you didn't keep the record?

A. We did not total the records. All the records are still in existence except one.

Q. You mean to say that you are as unaware that you made money out of the farmer's milk that you retailed here in Anchorage, or that you are in the same position with reference to the creamery that you know the creamery must have made money because the milk made money?

A. That's a matter of judgment.

Q. All right, now, everything else you run as a co-op lost money, didn't they?

A. Not everything.

Q. Pretty near everything?

A. Pretty near everything.

Q. Here is a garage down here. Every garage in town and in the division made money except the co-op garage, isn't that a fact?

A. I wouldn't be surprised. I think that is pretty close to right.

Q. Every store, every grocery store, that you know of in the Third Division made money in '45 except the co-op grocery?

A. I think that might be right. [266]

Q. And you want the Court to think, without any figures, that there is one thing down there that made money and you guess what it made?

(Testimony of Roland Snodgrass.)

A. No, we don't guess.

Mr. Davis: If the Court please, this is Mr. Grigsby's witness and he has no right to bully him. If he wants to ask questions, I have no objection.

The Court: Objection is sustained.

Q. (By Mr. Grigsby): Just another question: Now, in '45 in place of the books showing a net earnings of 66,000 as it did in '44, it shows net profit of the dairy-creamery of $57,001 and some cents. That's right, isn't it?

A. I believe so, yes.

Q. Now, for '45 you didn't make any additional payments, of 20 per cent and 21 per cent?

A. No.

Q. Nor at all? A. Nor at all.

Q. Now, those—I believe it is approximately $136,131 that was paid for milk as it was delivered, or that is, biweekly, for the '45 production?

A. I understand that is right.

The Court: Court will stand in recess until 11:15.

(Whereupon recess was had at 11:05 o'clock a.m.)

After Recess

Mr. Grigsby: Mr. Snodgrass, I will call your attention to Defendant's Exhibit 3, being an exhibit which shows the amounts paid to the claimants in this case as they delivered this milk, and certain items as to costs of hauling, and so forth. Now, you had, in 1944, similar figures before you when

(Testimony of Roland Snodgrass.)

you made these [267] 20 per cent and 21 per cent additional payments?

A. Not the individual breakdowns before me—just the gross figures.

Q. But each man's slip that is in evidence here showed 20 per cent on dollar value and that was based upon what you had already paid?

A. That is correct.

Q. What I mean is, that if this Court should decide that the claimants here are entitled to the $57,000 in controversy, then that would be apportioned among the milk producers in proportion to what they have already been paid?

A. I believe that could be the customary procedure, yes.

Q. For instance, if in '46 you had decided to give them 20 per cent additional payment as you did in '45, it would be 20 per cent of each of those totals?

A. I think that is correct, yes.

Q. I am just asking that as a method of computing how it would be prorated. Of course, that would include the milk farmers that are not a party to this law suit?

A. It would be the same, yes.

Q. It would be the same—as well as all others?

A. Yes.

Q. Now, I just want to ask you—your answer is confusing to me: This figure, $18,943.42, which is set forth on Page 3, which you looked at, as the net profits of the dairy-creamery after making them the additional payments of $47,528—the co-op

(Testimony of Roland Snodgrass.)

retained that sum and didn't pay it to the milk farmers? A. No.

Q. Now, do you consider that that sum represented what the profit of the creamery was? Was it fixed that way, or was it just [268] arbitrary?

A. Well, since you ask——

Q. Can you answer that yes or no?

A. You ask me what I considered it. I consider it slightly less than the profits made on the creamery production.

Q. Well, now, how do you figure that the creamery made more than that, except by pure guess?

A. Well, with regard to the split of these expenses which were split arbitrarily, those, as far as could be determined, were specific expenses of the departments, that is, the cost of the goods sold as you split this department up. And when you get down to the split of the arbitrary—or to the arbitrary split of labor and general administration, those expenses there which were split by judgment and, therefore, somewhat arbitrary—at that time there was considerable argument among the Board as to how those expenses should be split. You couldn't—we didn't have time clocks held on the employees to see how many hours they spent handling milk and how many ice cream, so that particular split of those two expense items—the general administrative and the labor—which couldn't otherwise be split, factually, were split arbitrarily and at that time the Board considered

(Testimony of Roland Snodgrass.)

that it was probably the most fair to lean over backwards to put as much in as earnings of the creamery—or in other words, to throw enough of the expense to the creamery to make sure that the dairy expense was not excessive.

Q. Well, but you didn't have any figures showing what you paid for powdered milk or powdered eggs?

A. We did by subtraction. [269] The auditor had prepared the cost of goods sold, which is determined by the customary method of—he takes all the purchases by the creamery——

Q. But Mr. Snodgrass, I have asked, three weeks ago, to get the figures of that—what the cost of goods sold was—and you know what the cost of the milk you sold was because you gave me the figures for the $136,000. A. That is right.

Q. I have asked you to get what the cost of your powdered milk was and what the cost of this and that item was that went into that creamery. Now, when you held out this 18,943 did you have those figures there? Did you make any computation?

A. Of the cost of goods sold in the creamery?

Q. Did you make any computations of the profits of the creamery whatever at the time you obtained this $18,000—not since, but at that time?

Mr. Davis: Your Honor, I think Mr. Snodgrass ought to be allowed to answer a question without three more being asked.

Q. (By Mr. Grigsby): I think I have a right to finish my question in my own form.

(Testimony of Roland Snodgrass.)

A. Well, I will attempt again: The auditor prepared a statement showing the cost of goods sold by the creamery and dairy—that is, all the purchases. That is one, and that is a specific figure and was probably as exact as he could make it—perhaps completely exact. Now, it is customary in the Association to keep a running record of all the purchases from farmers. That is, in order to be able to divide up the income [270] of the Association, as we must by law, the record of patronage is kept so the office at almost any time has the figure on hand, and certainly at the end of each year, of exactly how much was paid to the farmers for milk. The auditor has prepared the total purchases of the creamery-dairy, but subtracting the amounts paid for milk from the auditor's figures of the total purchases for the combined department, you have split—the balance there is used, then, as the purchases of the creamery. But that balance doesn't say—as the one for the dairy, say—this is all milk—it doesn't say, this was so much powdered milk, so much eggs, so much dairloid. It simply says, this is the cost of the total goods used in process——

Q. All right, you have got that—the cost of the goods sold is $176,000. That is in the statement?

A. Yes, or he had all the cost of goods sold as some $176,000, and the Association, for purposes of distribution of its income, has kept carefully that $136,000.

Q. That was paid to the milk producers?

(Testimony of Roland Snodgrass.)

A. Yes.

Q. Now, the balance of the 42,000, do you know where it went?

A. That balance of the 42,000, as I believe has been explained, was a lump figure which covered the purchase of butterfat, powdered milk, salt, deraloid, flavorings, and so forth—I believe eggs is in it also.

Q. And also the eggs that you sold here crated in Anchorage?

A. I think it is. I don't know for sure. [271]

Q. Which didn't go into the creamery at all?

A. Well, what do you mean, they didn't go into the creamery at all? You mean, didn't go into manufacture of supplies?

Q. Didn't go physically into the creamery, but into the market here and sold per dozen—that is included in that $42,000?

A. Well, let's see. The eggs were handled like the milk, went through the same channel.

Q. All right, that 42,000 includes what you paid for eggs? A. I believe it does.

Q. Do you know what you paid for eggs you bought from the farmers?

A. No, I don't know, but the figure is also determined at the end of each year.

Q. And you can't give it to me now?

A. No.

Q. And you don't know what you made on eggs?

A. No, I don't know. I know we don't know what was made on eggs.

(Testimony of Roland Snodgrass.)

Q. What did you pay the farmers for eggs?

A. Well, that price is one which changes like milk and we haven't tabulated it up.

Q. About what did you pay them in '45 on an average?

A. Well, probably—as a guess—perhaps a dollar a dozen, although it probably ranged from 85c to $1.15.

Q. Say an average of $1.00? A. Uh-huh.

Q. And you had to crate them and bring them in here, and what did they sell for on the market—on an average?

A. Customarily, about 10c more than we paid for them—sometimes 15c. [272]

Q. Did you make any money on eggs?

A. We have some years and some years we haven't.

Q. Do you know whether you made money on eggs in 1945?

A. Was any dividend paid on eggs in '45?

Q. What's that?

A. No, I don't think we made money on eggs in '45, but I couldn't say.

Q. Do you know how many dollars worth of eggs you purchased from the farmers in '45?

A. I don't, but—

Q. You testified about the percentage to the producer of milk sold outside being about 62 per cent, did you?

A. I said that I have discovered in written rec-

(Testimony of Roland Snodgrass.)

ords, magazines and books, where it has been that high. It averages somewhat under 50 per cent.

Q. But it has been as high as 62?

A. Yes, it has been.

Q. And now, did you read the report of the Agriculture Department that in 1944 it was about 62 per cent?

A. No, I haven't read that. Was that for the whole country, or was that for one locality or what was it? I didn't see it.

Q. That was an average for the whole country.

A. No; I have over here a number of figures, including the milk dealer report for practically all the large markets for 1945, which shows it ranged—well, this was July '45, although the figures were, I believe, put out each month, which showed it was 44 per cent in July of '45 and 49 per cent in July of '46.

Q. All right, now, did you find that in '44 the price received [273] on milk from the consumer was 19c a quart? A. In what year?

Q. '44? A. Where?

Q. Outside?

A. Well, I don't—I doubt if it is possible.

Q. ——as compared with, for the same period where you got 30c—that is, the retailer got 30 here?

A. Well, that could have been possible in certain localities. It couldn't have been possible all over the country because the all-time high throughout the country for the month of July, at least, was 16.3 until 1946.

(Testimony of Roland Snodgrass.)

Q. Now, here, in '45, you got an average in '45 of 30c a quart, didn't you?

A. No, the average—that is the average retail price on the city market in Anchorage.

Q. And what did you get for the milk in quarts?

A. I might say first, to continue that: A considerable amount of it was sold to the Army at a lower price and perhaps as much as ten per cent was sold in Palmer at 25c, and some at 20.

Q. Of course, you didn't have to haul that?

A. No.

Mr. Grigsby: That's all.

Recross-Examination

By Mr. Davis:

Q. Mr. Snodgrass, you were one of the first of the Grade A milk producers for the Matanuska Valley co-op, were you not? A. Yes, I was.

Q. I believe your number with the Matanuska Valley co-op—your dairyman's number—is No. 1, is that correct?

A. Yes, I [274] got that number one—it was the first Grade A dairy inspected by the Public Health Service in Palmer.

Q. Now, you have been, then, selling milk to the co-op since about 1940, is that right?

A. With, of course, the exception of the two years in which I didn't—specifically didn't. The same farm did and my father ran it.

Q. Your father ran it during the time?

(Testimony of Roland Snodgrass.)

A. That is right.

Q. Now, prior to the time that you sold milk to the co-op, I believe you sold cream on some occasions?

A. Yes, occasionally we sold some cream.

Q. But the dairy business as such, of the co-op, started about the year 1940, is that right?

A. Yes, between June 15 and June 24.

Q. Now, Mr. Snodgrass, during your tenure of office as a director and as a manager up there, has there ever been any such thing as the milk producers as against the co-op itself, or has this always been treated as the co-op?

A. Well, the business has always been conducted as the co-op until the distribution of the earnings of the Association, and then that becomes more or less specific. Until that time it is very much like coffee and sugar in the same store, until you begin to distribute the earnings.

Q. Now, you testified for Mr. Grigsby, here, about this breakdown between the creamery and the dairy. Will you tell the Court what happens when you make a cash sale, say through the dairy-creamery in Anchorage here? What happens to that sale? [275]

A. Well, the money, of course, simply goes down as cash sales and it is not shown whether it is from milk or from ice cream or from any other product. That is, on the cash sales.

Q. Now, that on the charge sales—on your cash

(Testimony of Roland Snodgrass.)

sales it just shows so much money in from the Anchorage Dairy? A. That is right.

Q. Which might be ice cream or cottage cheese or popcicles or bottled milk—might be any of them—or eggs? A. That's right.

Q. Now then, as to charge sales?

A. Charge sales, of course, are quite specific. They are for ice cream or milk or for any of the other items which are sold.

Q. Now, have those charge sales been analyzed to determine what proportion, at least, of the charge sales are dairy products and what are creamery products?

A. For the years—1944, certainly; I believe 1943 and 1945, have been—on the charge sales have been broken down exactly into the sales of milk and milk products and the sales of creamery products.

Q. Now, isn't that where Mr. Allyn—isn't that what he used as a basis for finding out what the breakdown was between these two departments within the department?

A. The ratio that existed by adding up all the milk sales and all the ice cream, popcicles and other credits, was used to split the cash sales. That was split arbitrarily, but it's the best figure for that purpose, since there was no other means of breaking the cash sales [276] down.

Q. Then the figures Mr. Allyn gives are not pure guesses?

A. They had behind them every bit of knowl-

(Testimony of Roland Snodgrass.)

edge we possessed, and that knowledge covered, perhaps, as much as 90 per cent or 80 per cent of the sales—certainly a preponderance of the sales.

Q. Now, from the standpoint of the co-op, is there any reason for breaking down the receipts of the creamery and the receipts of the dairy into two different categories?

A. From the standpoint of the co-op there is, and has been, no reason up until the point of distributing the earnings to patrons. However, it is considered at the present time that the system is inadequate, and that efforts will be made to break them down further in the future.

Q. Now, Mr. Grigsby was talking to you about the figure, $18,900 here. Do you know what became of that $18,900?

A. Well, you see, that $18,900 is really a book figure. It is somewhat a fictitious figure. However, what happened to the money which was so represented was that since the rest was paid out, that particular part of the Association profits, which here shows as part of the creamery-dairy profits, was used to pay the—well, really, to plug the hole shown by the red figures. It would be used for—that is, that that, plus all the other black figures or departmental earnings, is used to first offset the losses in departments which still lose money and the balance remains—I think that balance of some 11,000, which might be partly creamery, [277] partly warehouse, partly store or anything else, which hap-

(Testimony of Roland Snodgrass.)

pened to make money, is set up as repayable to the patrons of the Association. Actually——

Q. Actually went to pay the operating and maintenance expenses of the co-op?

A. That is right, and whatever is left over is still refundable to the patrons.

Q. I think you testified the first time you were on the stand, some two or three weeks ago, that the pertinent figures here were the figures of the earnings of the Association—of the co-op—that the earnings of the different departments were merely departmental breakdowns for the purpose of showing which departments were losing money and which were not. Was that your testimony?

A. That's right.

Q. Is that still your testimony?

A. That is still it.

Q. Now, in the year 1944, the books show that the creamery-dairy department of the co-op, on this departmental breakdown, showed a profit of some $66,000, I believe. Now, in that year the total Association also showed a profit of somewhat similar figure, did it not?

A. Well, it was a lower figure—1944, I think, was in the 50,000's.

Q. All right. Now then, when you got ready to distribute the profits of the Association in 1944 how was it done?

A. Well, as I said, they would start with the earnings of the Association, which is the maximum amount which could be distributed. The depart-

(Testimony of Roland Snodgrass.)

mental breakdown shows that greatest percentage of [278] that 57,000 came out of the creamery and dairy. The two other departments handling farmer's produce both showed in the red. So consequently, of the produce departments—that is, the departments which handled farmer's produce—which get cash dividends, the only one necessary to determine from the standpoint of cash dividends was the milk products. So that part of the Association profits which was determined to come specifically from milk products by the system which we have been going over here, was paid to the dairymen in cash.

Q. And that represented those two payments, one of 20 per cent and one of 21 plus?

A. Yes. The first one was made before the audit was complete. The Association accountant stated that we had enough safely to pay before the outside audit, and suggested that we make that payment because of the need for cash of all farmers, before the audit, and that we could make the final payment after the outside auditor had gone over the books.

Q. And then the second payment was made after the books were finally audited?

A. That is right. And then, of course, the remaining balance would be set up on—since it is made on what we would call consumer units—the warehouse, the garage and trading post—would be set up on ten-year notes and consequently wasn't—well, its setting up is deferred; it's simply held as distributable profits.

(Testimony of Roland Snodgrass.)

Q. Now then, for the year 1944, 40,000-plus of the net operating profit of the co-op was paid to the milk and egg [279] producers?

A. That is right.

Q. Out of an operating profit of something over $50,000 that year? A. That's correct.

Q. Now, that figure has nothing to do with the profits of the dairy department as such, except insofar as, since you figure the dairy department made most of the money, most of the surplus was distributed to the dairy department, is that correct?

A. That's correct.

Q. Now, is that the same way that the profits of the Association were distributed in 1943, Mr. Snodgrass? A. That's right.

Q. Now then, if the same procedure were used for the distribution of 1945 net income of the Association, how much money would be available for distribution to all the producers?

A. Well, it would be—you see, the Association, in 1945, following the same custom, would consider that it had the $2800 to distribute; that a certain percentage of that was made by the combined creamery-dairy; that of that a certain amount was earned on milk and milk products; and the balance was earned on creamy products; and it would, perhaps, mean—oh, not more than $2,000 to distribute.

Q. And do you know whether or not an offer was made to these plaintiffs here—these milk producers—to pay them their share of that $2800?

(Testimony of Roland Snodgrass.)

A. I don't know. I have heard such suggestions—either a suggestion or an offer made by individual members of the Board—but I don't think there is such a thing [280] as the Board action which would constitute the offer. But it has been stated individually, the question has been asked and the dairymen said—so far have not been willing to accept it.

Q. Now, was there any difference at all in the procedure that was followed in 1945—different from the procedure that was followed in 1944 or 1943, so far as payment of the milk producers was concerned?

A. No, there has been a slight difference in price, but not procedure.

Q. You mean they were paid more every two weeks than they were in '44? A. That's right.

Q. But the procedure at the end of the year has been exactly the same? A. That's correct.

Q. The difference between the two years being that there was a relatively small distributable profit in '45? A. Made by the Association?

Q. The entire Association?

A. That's right.

Q. $2800 as against $55,000?

A. That's right.

Q. Now, we have talked considerably here, Mr. Snodgrass, about the way these inter-departmental overheads are allocated to different departments. Have you done some figuring to determine whether or not the creamery, dairy, by the way things

(Testimony of Roland Snodgrass.)

worked, actually contributed to a part of the loss of the store, for instance, or the garage—or, to put it another way, as to whether or not the store or garage actually contributed to the profit which the creamery showed? A. Yes, I did. [281]

Q. Do you want a blackboard to explain how you arrived at those various figures?

A. Yes, I would like it. I would like to say one thing first: Why I got to wondering about it was because of two or three different occurrences—one at least two years ago and one recently—with the manager of the grocery. It has been customary among all the units to—the unit manager to object to the high overhead that they have to carry. For instance, I believe in this audit here—I believe it shows that the G&A charge—salaries, the office, the insurance, etc.,——

Q. You had better explain what you mean by "G&A."

Mr. Grigsby: General Administrative?

The Witness: Yes, General Administrative—I believe it is charged to them at 12.494% of the total sales, and that means that if the Association sells a million dollars worth of goods that each dollar has knocked out of it before they start even paying their help—it has knocked out 12 and a half cents. And the grocery manager had decided that if he could get some wholesale business, which he would sell at landed cost plus ten per cent, he could boost his sales up and make money by it, which is obvious because he could do it with very little additional

(Testimony of Roland Snodgrass.)

expense and he could make cash by it; but he did notice that if he sold at cost plus ten per cent he would have a loss of 2.49 per cent on it because of this general overhead charge. Now, actually, if he did make these additional sales, he would reduce that 12.494 to, perhaps, 12 and a quarter, or if he made a [282] big increase in the total business of the Association, reduce it further. But as it was, for each thousand dollars that he would sell, he would not make money for himself—he would lose two and a half percent of that amount, which, of course, was $25.00 on each thousand, which started him thinking: if he loses it, yet the Association makes it, it must appear in some other department. I ran into the same thing with the manager of the meat department when we worked on slaughtering pork for the Army, which we agreed to do and did on a basis of all costs plus five per cent. Yet, the five per cent was less than the general overhead charged against him and it would throw his department in the red which, of course, he objected to because it looked as though he were not properly managing the department. And so I worked out for my own satisfaction a rather fantastic profit and loss statement which shows the principle which operates, where any sale such as the cost-plus to the Army at a low profit, any wholesale in which the profit—although a real profit—is less than the general administration charge on the unit, or where the warehouse sales which we customarily make at a low mark-up plus a low discount, if the seed and

(Testimony of Roland Snodgrass.)

fertilizer are taken out of the car, and those sales all tend to throw the department involved into the red and to push the profits over into some department which does not have a similar sale. And so I made up a profit and loss statement, which is—all the figures are purely hypothetical—which simply shows the principle which [283] operates there—the shifting of the general administrative expense, which can show that one department, by going into the red, can force another department out of the red. And this is very true of the way—of what happens in these books, and it is true because of the fact that the high general overhead that we have, and always have had, is prorated—not arbitrarily—by the auditor, but it is prorated on the basis of the total sales of each department with, of course, the exception of the Produce Department, which has been set by the Board at a lower pro rata——

Mr. Grigsby: Which——?

The Witness: The Produce—that's 5/12—and this figure, as it is shifted around it can throw one department in the red and yet know you made money by going in the red and that money will appear in another department which has not altered its performance in any way—yet it will show an increased loss in your department on a transaction you made money on—like saying black is white—except any time any department considers making a large sale at a low price the manager discovers is going to lose money for his department, and knowing very well that he is still making money

(Testimony of Roland Snodgrass.)

for the Association, he objects to it because it looks like a reflection on his ability.

Mr. Davis: In other words, Mr. Snodgrass, the corporation books, as such, taken as a whole, reflect the matter correctly as to what profit is made, but your inter-departmental breakdowns [284] when they show a profit may be merely a paper profit, is that correct?

A. They can be so long as there is any difference in the rate of mark-up used by the two departments concerned—or any two departments.

Q. All right now, you figure your general administrative expense according to dollar value, don't you?

A. Yes, the auditor arbitrarily does that because he says you have no better basis, so he goes ahead and does it and he will throw a department into the red on that basis when that department could have—or perhaps actually did, make money.

Q. Now, supposing you have a department with a high volume of business and a low mark-up——?

A. If its mark-up over the cost of the goods and the cost of the labor is less than 12 and a half per cent that department will run into the red, but if it does actually make money, which it certainly may—if it makes $1.00 over the cost of the goods and the labor and direct expenses, it does make a profit and yet it will show in the red.

Q. When we keep these interdepartmental breakdowns, then, does it tend to push the profits of one of these high-volume low-mark up departments into

(Testimony of Roland Snodgrass.)

the profits shown by another department with a high mark-up and, say, a low-volume—or, anyway, a high mark-up? A. It does exactly that.

Q. Now, what are the departments in which that might occur at Palmer?

A. Well, the meat department when it was operated as a wholesale—or any wholesale business done by the meat department, [285] and specifically this one where I discovered this when it operated on a cost plus five per cent basis for the Army—any unit which does a considerable wholesale business at a low mark-up, for instance, the warehouse, which easily sells twenty to thirty thousand of seed and fertilizer at a low mark-up plus a discount, and it could also happen if the grocery department wholesaled on a cost plus five or ten per cent, or any percentage less than the 12.494—it would throw those departments in the red and the department which would come out are those departments which would have a high rate of mark-up—a mark-up over the G&A expense. What, in effect, is happening is that this additional sale which perhaps paid for the goods and all the cost of handling the goods, has lessened the burden of general overhead on all other sales, and consequently it increases the profits as shown in the departmental breakdown on all other sales, but it will definitely throw the department which makes it into the red, or reduce its profits.

Q. Under your theory, then, is it quite possible that this so-called $57,000 paper profit of the dairy

(Testimony of Roland Snodgrass.)

department—dairy-creamery department for 1945, actually was contributed to by some of the other departments that show a paper loss?

A. Well, in this way: Supposing all the sales of the other departments were taken out—the departments were wiped out—and yet the Association as it was purchased from the Alaska Rural Rehabilitation Corporation had the same buildings and the same debt, the [286] office personnel could be cut down but for each dollar of sales it would be a higher figure. That would, perhaps, wipe out—if it was just the creamery and nothing else which had bought the physical set-up that the Association has, it would probably break even or lose money instead of showing a $57,000 profit, or $66,000 profit, and the only way to alter that situation would be to increase volume, either in that unit or to open up other units, because we have a high fixed overhead. And so, it simply means that each unit which is added to the dairy-creamery, or added to any existing business, tends to increase the profits of that existing business, although this additional unit may lose money on the departmental breakdown. That is, each additional volume of sales reduces the load on all business previously conducted.

Q. That comes because of the fact that the indirect overhead is put on the basis of dollar volume for the lack of some better way to break it down?

A. That's right.

Q. Now, isn't it a fact, Mr. Snodgrass, that the creamery, as such—the creamery-dairy actually con-

(Testimony of Roland Snodgrass.)

tributes more to the cost of operation of the power house, for instance, than other units?

A. Well, it contributes more to the cost of operation but, of course, it is charged more for the cost of operation. The only thing which isn't taken into account there, which perhaps could be solved two ways, is that the creamery-dairy need a high-pressure steam plant, whereas the others could operate on a low-pressure steam plant, which means it necessitates a slightly [287] higher cost of—well, it necessitates a more expensive form of heating. Now, that could be solved in another way by putting a small high-pressure steam plant in the creamery-dairy itself.

Q. Now, the creamery-dairy actually uses more steam than, for instance, the warehouse?

A. Oh, yes, considerably more.

Q. But the overhead of the power house is charged according to dollar volume in both cases?

A. Somehow, I thought there was an adjustment made. I may be incorrect. I thought the creamery was charged more because it used more. I could be incorrect.

Q. Well, I may be wrong in that case myself, although I believe the books show a regular dollar breakdown for the overhead.

A. Well, if the creamery even paid on a dollar value breakdown for the steam, then it is not being charged sufficiently.

Mr. Davis: Now, your Honor, I want Mr. Snodgrass to illustrate on the blackboard his theory, but

(Testimony of Roland Snodgrass.)

it is 12 o'clock—may we suspend at this time and take it up this afternoon?

The Court: At 1:30?

Mr. Davis: It is agreeable to me.

The Court: To you, Mr. Grigsby?

Mr. Grigsby: Yes, your Honor.

The Court: Court will stand in recess until 1:30.

(Whereupon recess was had at 12 o'clock noon.)

Afternoon Session

The Court: You may proceed, Mr. Davis.

Mr. Davis: Mr. Snodgrass, at this time will you take the [288] blackboard and explain to the Court the things you were testifying to this morning about the general and administrative overhead being proved, moving from one department to another in this interdepartmental breakdown?

A. All right. Now, first, none of these figures are actual. They are simply to show the principle of the movement of this heavy G&A expense we do have up there, the way it moves toward sales and the total effect on departments when broken down, but none of the figures are actual and there are only one or two actual facts which will come in after as examples of where these do happen.

First, if we assume that we have the cooperative set-up, that we purchased from the Farm Security and the Corporation up there at Palmer, and that it was all the same buildings and was exactly the same indebtedness as we undertook, and that it had

(Testimony of Roland Snodgrass.)

just exactly one business—that was the creamery business—it had the bulldings for other businesses and for the sake of just working in the terms of unity—because this is only to show a principle—we will assume the creamery had total sales of a million dollars in a year and we will set up its profit and loss statements as it might have occurred—just the basic items and profit and loss statement. So, we will assume the creamery-dairy profit and loss statement would look like this at the end of the year, if nothing else happened; that the sales were $1,000,000; the cost of goods sold was $600,000; then its gross profit on the transaction would be $400,000; the operating expense, which would [289] be the supplies and labor and those things which can be directly charged to that operation, to have been $200,000. And now, we have the net profit before the distribution of the general and administrative costs, which is—this is simply following the procedure that is shown in the profit and loss statement of the Association and also the breakdowns, and that I—and also the same system which is followed in the departmental breakdowns. The net profit before the distribution of the G&A costs would then be $200,000. Now, distribution of the general and administrative expense would be the next deduction, and assuming it to be $200,000, we would have a net profit on operations—net profit and loss of nothing. The Association would just break even under that condition.

(Testimony of Roland Snodgrass.)

Now, if, during the year—and I will take as an example, one additional—it will be this cost plus operation that we performed for the Army on processing pork for them in which they agreed to pay—it was really an argument over prices: Our prices were too high, so they ultimately agreed if we paid the farmers from whom we bought the pigs —if we paid them the Seattle OPA ceiling price plus the freight between here and Seattle on commercial carriers, that would be the first item on our invoice to the Army. It would be the cost of the pork at the rate of pork plus freight. The second item would be the exact cost of processing that pork, which would cost all the labor, all the supplies, the additional coal we used in the [290] slaughterhouse, the additional electricity that we used in processing and the additional refrigeration. And the third item was agreed to be five per cent of the gross sales price of this—for these invoices, which was a cost-plus basis, the cost being the amount paid for the goods—the amount paid to the labor and the amount paid for supplies—and then the Association was given a profit of five per cent of the total sales price. We arrived at that arrangement by considerable argument, and we did argue that that five per cent was less than our general administrative expense and they countered with this statement here: That since you will not have to build any more buildings, not increase your debt, you will not have to hire any additional office personnel, this five per cent will exceed any increase

(Testimony of Roland Snodgrass.)

in your general administrative expense. To which we had to admit. It would exceed any increase in it although it was less than the general average.

So once again, on the same basis, assume that we sold one million dollars worth of meat, and that sets up what would be—maybe this occurred just during the three months, but it would set up a meat pool which ultimately would be shown as part of, or all of, the Meat Department. We sold a million dollars worth of meat to the Army for which we paid the farmers $700,000, which is the cost of goods sold, leaving a gross profit of $300,000 from which we paid for labor and supplies $250,000, which left us a net profit before distribution of general and administrative [291] expense of $50,000.

Now, since we had already the general and administrative expense here in what would have been the Association had we not undertaken that transaction, the increase in general and administrative expense was—assuming this to be so—only $10,000, and that is probably excessive because we would not have had to build any buildings, to depreciate them or increase our debt or increase our office staff by any more than that amount—which would have shown on that meat pool a profit of $40,000.

Now, a parallel situation did occur, except that the amounts were about one-tenth all the way through—except by per cent it was the same. And, of course, this is three to five times as big as the dairy business. But this is only to illustrate a principle.

(Testimony of Roland Snodgrass.)

Now, at that point, for whatever did occur down here, I was approached by pork producers, who pointed out that we did make a profit on that and that, being a cooperative, we were supposed to turn the profit back to them. The Association took the assumption that since they did not bear a fair percentage of the increased cost on these profits made, they would not refund it. I said if the Association did make a profit and if that department did make a profit, they would refund it, but as it happened the Association stopped right there and paid out no more to the farmers. The invoice to the Army was the cost of the goods sold and the labor and supplies and the five per cent on gross sales, [292] or these three items here, for which they paid us $1,000,000.

Now it stops in that condition there. This may have been just during August and September and October and that stopped. The operation was completed. Nothing was done until the auditor comes at the end of the year. He sets up the profit and loss statement for the Association and he says: "Your gross sales were $2,000,000," which is the total of these two, and from now on we will use the totals of those across. The cost of goods sold was $1,300,000. The gross profit was $700,000. The operating expense was $450,000. The net profit before distribution of G&A expense was $250,000. G&A expense was $210,000. Therefore, the net profit was $40,000 made by the Association, which

(Testimony of Roland Snodgrass.)

has been transferred now out of that meat pool over to the Association.

Now, beginning at this point here the auditor will have the profit and loss statement of the Association in the procedure customarily followed, and then he will break it down into the departmental P&L's shown in that audit book. He will break it down and use all these figures which are still actual. They are compiled figures by process of each sale, or each purchase, of the labor payrolls, and so on, and he will come to this result: That the sales on the department—creamery-dairy—was $1,000,000; and the sales on the department—meats—was $1,000,000. The cost of the goods sold was the same as it was up there: Over here 600,000, and over here 700,000. The gross profit is the [293] same as it was up there: 400,000 here, and 300,000 over here. The operating expense is the same: 200,000 here and 250,000 over here. The net profit before distribution of G&A is the same: 200,000 here and 50,000 here.

(During all of this testimony of Mr. Snodgrass he was at the blackboard, writing as he talked.)

Now, the auditor says we have to distribute the G&A expense, which is $210,000, and the only way we can do that is on the basis of dollar sales. So, he proceeds to distribute the G&A expense like this: $105,000 here, and 105,000 here, and he winds up with a net result for departments of $95,000 profit over here, and $55,000 loss over here.

(Testimony of Roland Snodgrass.)

Now, that is what I was talking about this morning. That is, in principle—and this is only principle—is exactly what happens whenever we make any wholesale transactions at a low profit. We made money. Nevertheless, in these books the way they are handled because of the distribution of this general administrative expense on that basis, that simply throws the general administrative expense in a fluid manner over into the increase sales and it will throw it into the red in some other department. That is only a principle. It may be wrong, but it appears to happen whenever you contemplate a wholesale transaction with a low profit.

Mr. Davis: I think maybe before we go ahead, if either the Court or Mr. Grigsby has any questions on these particular [294] things, we might as well ask Mr. Snodgrass while he is on his feet.

The Court: The Court has no questions at this time.

Mr. Grigsby: Not I—I don't care to examine now.

Mr. Davis: All right, you can resume the stand. (Witness did so.) Now, Mr. Snodgrass, take the years 1943, '44, '45 and '46: Are there any milk producers on the Board of Directors during those particular years?

A. Well, there have been milk producers on all of those years.

Q. Thinking back over the various Board members, could you tell about what percentage of the

(Testimony of Roland Snodgrass.)

entire Board were milk producers during the various years?

A. Well, in the—as I recall, at the beginning of 1943 I was the only milk producer on the Board. During 1943 there were perhaps two more put on the Board by election. In 1944, I believe, there were four milk producers on the Board, and in 1945 at one time there were five.

Q. How many men are there on your total Board?

A. The total Board is seven except when there is a vacancy close to the end of the year which isn't filled.

Q. Now, having sat on this Board as you have, and having been manager, do you feel that the Board has been favoring the produce growers over the milk producers?

A. Well, I have never thought that. I have always—having had contact with the Board all but one year, I have always felt that the Board set down and tried to figure as fairly as they could to favor no group over [295] any other.

Q. And to handle the co-op as a co-op rather than a bunch of small groups?

A. I think—yes. I think that has been the consensus of opinion, although I imagine there have been times when one or more individual members have differed with that policy.

Q. Now, Mr. Grigsby here at the time testimony was being given prior to the time we resumed yester-

(Testimony of Roland Snodgrass.)

day, made some references to the fact that in 1946 it looked as if the produce dealers had received all the money received from their produce—or practically all. Do you remember that?

A. In—I remember something about that, yes.

Q. Now, Mr. Snodgrass, has there been a market for all the milk that could be produced during the last—oh, say, since 1940? Have you had a market for all the milk you could produce?

A. We had a market. We have been short of bottles, but there has been—well no, I better qualify that a little bit. There is a market, although during some months in a extreme peak of productive season, the supply will, you might say, it will rocket upwards faster than we reach out and get the market which is there for it, but faster than we contact the market, and at those times we will have a slight surplus. But as a general statement there is a sufficient market for all the milk that has ever been produced.

Q. In fact, most of the time, there has been a distinct shortage?

A. All the winters and—well, most of the time.

Q. Now, have you had to take any milk out and dump it because there was no market for it?

A. Though, as I spoke, if we have a very—a great rise over a period of a week or two weeks, we may get a surplus in that manner which we have to dump simply because we can't contact the market fast enough and the supply will be back to

(Testimony of Roland Snodgrass.)

normal before we have contacted that additional market, which is still there.

Q. Well, by refrigeration you can keep that milk over a certain period of time?

A. The period is too short and the volume too great for any holding capacity which we have. Milk is perishable.

Q. Now, let us think a little about produce—lettuce, celery, things like that. Is the same thing true as to the market of those?

A. No. During the year 1944 and 1943 the same thing was very nearly true. You could sell everything, practically, as fast as it came on and if you did get an over supply at any time it was for very short duration. You might get some spoilage, but on the other hand the commodities were not so perishable and could be held longer.

Q. Now, how about the last two years, for instance, on that sort of thing?

A. Well, agricultural production, as a general thing up there—that is beyond a certain point—is sort of a war baby. It mushroomed—it expanded rapidly when the development came here in Anchorage with the increase in population—that of Anchorage and the increase of population of Fort [297] Richardson—and production, especially in vegetables—that is, rapidly in vegetables and slowly in milk—has increased to meet that increase in population. However, in 1945 the population—the military population decreased considerably, and that was a market which—oh, in some commodities took

(Testimony of Roland Snodgrass.)

60 to 70 per cent of what we produced, and at that time in the vegetables which are—that is, the production of vegetables—can be increased easily, it had been moved up to within the seasons that we can sell the entire amounts that the military population, or the fort's, that we could contact could use. With the decrease in military population after the crops had been planted, we did have a considerable surplus of those items.

Q. Now, when you had a surplus in those items, what became of that surplus?

A. Well, we tried only one cure which was even reasonably good and very hard to perform, but it was to send a committee out to different growers—the committee consisting of growers—and pro rate the amount which those growers could bring in during any period of surplus. It was very hard and cumbersome, but it worked pretty well, except we—it was so hard to do to visit each little patch of lettuce, each little patch of each vegetable, in which there might be a surplus and set a ratio, or set a limit on the amount which would be received during any time, that the system fell down when this surplus became too great and we simply were swamped. We would have on hand hundreds—not hundreds, even thousands—of [298] crates of lettuce and celery which had been brought in and the Association accepted under the marketing contract and with all the consequent confusion, and the Association would simply attempt to store that and sell it as they could,

(Testimony of Roland Snodgrass.)

hoping for a break in the market, and as they began to perish in storage to try to work it over and salvage as much as they could of it. And it didn't work.

Q. Now, that resulted—I presume that resulted in a considerable loss when that stuff was delivered and couldn't be disposed of or couldn't be disposed of without constant working over when it began to spoil?

A. It resulted in losses in more than one way. In the first place, we poured a lot of bad labor into it in as much as we were unable to sell a great per cent of it which we had accepted, stored, graded, re-graded, re-stored and re-graded and ultimately had to throw out as a bad deal. And in some cases where it looked as though the market was favorable, I believe we made mistakes and paid on it too soon and ultimately it developed we were unable to sell it.

Q. Now, Mr. Snodgrass, assuming that a lot more lettuce or celery were delivered than what you were able to dispose of, these figures Mr. Grigsby quoted are the cost of goods sold—in other words, the cost paid to the farmer? A. That is right.

Q. As against the cost—against the retail price—the amount received from the consumer? Well, that figure as such doesn't bear any necessary relation at all to the amount of [299] produce that farmers delivered, does it, in a case where you had a lot of loss?

A. No, it doesn't. Well, yes, there is a sort of relationship, but there is no where near any exact relationship in there.

(Testimony of Roland Snodgrass.)

Q. Well, take our milk producers: Relatively all the milk they delivered was sold?

A. Yes, relatively all—a very high percentage of it.

Q. They would get a certain part of the consumer's dollar for all the milk they sold?

A. Well, they have—they have received what we have called an advance all the way through—they have received a high advance. You see, depending upon the amount you expect to be able to sell, the Association has followed a practice of making an advance which it considers safe. In other words, when we know from past performance that we will sell practically all the milk the advance can be raised up closer and closer to the maximum amount which can be paid for the item. When there appears to be a surplus, if the surplus isn't—well, isn't predictable as to how great it is, this advance is dropped on other commodities so that if—you try to be sufficiently conservative so you can't lose the advance by it—but you can also make some bad guesses because the confusion gets pretty thick there.

Q. The point I was trying to get across was this: A produce dealer might receive all of the consumer's dollar for the produce and still get a small percentage per item for the stuff he [300] delivered, if a lot of that stuff spoiled, mightn't he?

A. Yes. That is going back to this Article (7) of the marketing contract, which states that, I believe, the Association pays back to the farmer all the proceeds, less the (5) deductions, realized from

(Testimony of Roland Snodgrass.)

the sale, I think. If it should happen that you received, as we agree to receive, 10,000 cases of lettuce, which is a possibility—we have sold as many as 6,000 in a season—and yet we sold only 2,000 of those, then the farmer might receive—would receive payment, certainly, for only the amount received from the 2,000, less whatever labor the Association put in on the 10,000. This is the way it is supposed to work if one can do that. But you may have made an advance of, say, 40 per cent of the value of the lettuce come in and you will sell only 20 per cent of it, which means you lose your advance plus your labor if you make a bad guess, or if the season happens to work wrong.

Q. Now, supposing you receive this 10,000 crates of lettuce, and you sell only 2,000, and supposing the farmer gets back relatively all the money you receive for the 2,000 crates of lettuce, then he still would be receiving only a small amount per case on the lettuce he delivered, wouldn't he?

A. That is right.

Q. That is the point I am making. Now, so far as the milk men are concerned, they have consistently received 50 per cent or better of the consumer's dollar for the product they delivered, is that right? A. That's right.

Q. According to your testimony yesterday?

A. That is correct. [301]

Q. Even without these dividends or bonuses or extra payment or whatever they may be called?

A. With the exception of 1940—they got around

(Testimony of Roland Snodgrass.)

44 or maybe perhaps as low as 40 per cent of the consumer's dollar. But from 1941 on, when the market was pretty well known and we did have a good market, the down payment—the initial advance, or whatever it is called, was approximately 50 per cent of the consumer's dollar.

Q. Can you break down for the Court the figures in such way that you can tell about what the farmer got for a quart of milk in 1945, on the advance or the first payment or whatever we call it?

A. Well, if that sheet is available showing the prices paid to the farmer for milk on the bimonthly basis.

Q. We have that here (getting an exhibit from the Clerk).

A. Instead of reading that in terms of dollars per hundred, read those figures in terms of cents per pound, which is the same thing. It is simply dividing through by a hundred. There are approximately 2 1/6 pounds per quart of milk, so multiplying these figures by 2 1/6 all the way through would give the price paid for milk. The most relevant figure all the way through is to use the one for four per cent milk. Did you want for 1945?

Q. I think that's best since that is the period we are talking about here. (Witness started to figure.) You are not writing on that sheet, are you?

A. I am afraid I am.

Q. I had better give you another piece of paper. Here is the same thing and you can write on this one.

A. Well, now, using [302] that basis on four per

(Testimony of Roland Snodgrass.)

cent milk the farmer would have received approximately, in the first part of 1944, 13.46—I beg your pardon, in the first part of '45 he would have received 13.46c per quart.

Mr. Grigsby: I didn't get your figure per quart?

The Witness: 13.46c. After the first of August, 1945, he would have received approximately 14½c per quart. After the first of September he would have received approximately 15.6c per quart. And after the 16th of September he would have received approximately 16.6c per quart.

Mr. Davis: All right. Now, that milk at that particular time was retailing in Anchorage for how much?

A. During all that time the prices for which it was retailing would be—and this includes the mark-up of the stores which were handling it—30c a pound to the civilian market—or 30c a quart to the civilian market; 26c a quart to the Army, which, during 1945—during the early part of 1945—were taking a large percentage of it; during the late part a smaller percentage. Usually in the winter time the Army arbitrarily took one-half of our milk, and perhaps 10 per cent of that milk was selling in Palmer at 20c—well, no, part of it was sold in gallons at 20c per quart, and part of it was sold over the retail counter at 25c a quart. So it had four prices: 20c in gallons at Palmer; 25c, whatever was sold retail at Palmer in the two stores there; 26c a quart to the Army, and 30c a quart to the civilian trade in Anchorage. [303]

(Testimony of Roland Snodgrass.)

Q. Now, Mr. Snodgrass, just trace what happens to that milk after it comes into the creamery. What do you do to it?

A. Well, when it first comes into the creamery, it is dumped into a weighing vat and each farmer's milk is weighed separately and the weight is recorded on a slip on the wall which is kept there for 15 days and then replaced with another one. It is left there at all times and everyone can go in and look at it. In fact, they could change it, except nobody has yet. While it is in the weighing vat, or as it is dumped from the weighing vat into the pump vat, sample is taken for testing. This sample is kept and tested with other samples of the same man's milk periodically to get his average composite butterfat test for the bimonthly payments. Then it is pumped into a holding tank until enough has been put in there to pay to start loading the milk truck, and as the milk is dumped it is then put into the milk truck, with the exception of the amount held out for Palmer. And then, from the standpoint of standardizing, since it is desirable—or is customary now—to put a uniform percentage of butterfat in the milk each day, a certain amount is kept out depending upon the test, and it is separated. In the summer when the milk test is low the cream is put back in with the milk in order to raise the test from the average we receive to the average we are marketing; and in the winter time the skim milk is put back in to lower the average from what we are receiving to what we are market-

(Testimony of Roland Snodgrass.)

ing. So we have a uniform test all year round. Then the milk is hauled to Anchorage. [304]

Q. What is that truck? How does that truck operate?

A. Well, the truck, of course, is a 1200-gallon stainless steel thermos bottle.

Q. Glass lined?

A. No, it is stainless steel tank throughout, insulated with cork and with metal on the outside. It is hauled down to Anchorage, pumped into the pasteurizers and it is cooled there inasmuch as there is sufficient time before any bacterial growth starts to permit its being handled that far without cooling. Of course, it had been cooled before it comes in and any warming up that it does is taken back out of it by cooling in the pasteurizer, simply by circulating the milk in a vat through which cold water is running in the jacket. Then it is held overnight. It is unloaded here about three or four in the afternoon; it is held over night and pasteurized very early the next morning and put on to the market. After it leaves the pasteurizer it runs over a cooler, which drops the temperature from 143 degrees down to 50 degrees, then it runs through the bottling machine, which puts it in the bottles and caps it. Then it goes in the cooler just until such time as the delivery trucks, or the buyers' trucks come and take it out.

Q. Now, the milk that is going to be sold retail is sold by a driver with a milk wagon, isn't it—milk truck distributes it around town?

A. It is at the present time. Some may also be

(Testimony of Roland Snodgrass.)

sold by stores. In 1945 there was no retail route so it all was sold through stores in different parts of town to which the [305] drivers either made their delivery or the stores sent their trucks for it.

Q. Then the stores pay you a certain price for that milk and make their mark-up and then the retail price has been this 30c?

A. The stores paid us 25c and their retail price was 30c, so we didn't receive that additional nickel in there except, of course, on the small percentage that was made by retail customers dropping in at the dairy and buying milk there. But that is a small percentage. That really is just in proportion to the number of stores that were selling milk.

Q. Now, how about the Army? How was that handled?

A. The Army milk, of course, was all bottled in half pints. The Army insisted on that and it was quite a nuisance, but the Army milk was bottled in half pints and the Army brought a truck there to the plant and picked it up and returned the bottles each day they came in with the truck. There was one significant difference was that on the milk sold up town there was a bottle deposit to guarantee the return of the bottle, whereas the Army did not have such bottle deposit, so the Association had to stand all the breakage on their bottles whereas up town if you took a bottle out and broke it you forfeited the deposit.

Q. Then, between the time that you bought this

(Testimony of Roland Snodgrass.)

milk for 13 to 16c per quart, as you have testified, you actually sold all of that milk for 25c or less, didn't you?

A. 25c or less with the exception of the small amount sold in bottles at the dairy. [306]

Q. But the consumer paid 30c, 26c, 25c, and 20, according to the schedule you mentioned?

A. That is correct.

Mr. Davis: Thank you, Mr. Snodgrass. That is all.

Redirect Examination

By Mr. Grigsby:

Q. Did the Army come to Palmer for the milk?

A. No, the Army picked up their milk at the pasteurizing plant in Anchorage.

Q. Now, what you mean there, where you illustrate that the co-op lost money on some hogs they sold to the Army, is that in proportion to the amount of the transaction, the indirect overhead——

A. Shifted.

Q. The indirect overhead was so much and the profit so small that you lost money? In other words, you didn't charge enough?

A. Well, if you will notice the transaction itself, we made money on the thing as we knew we must.

Q. Well, how did you make money when you failed to take into account the indirect overhead?

A. Well, we have to take on lots of operations in order to ever make a profit—a lot of operations which make up just $1.00 over costs—in order to

(Testimony of Roland Snodgrass.)

spread that indirect overhead and to reduce it on each dollar sale. If you will notice just the pork pool you will see that we did make $40,000 over all the costs and over the increase in indirect overhead.

Q. Yes, but you didn't charge enough or you would have had enough to pay the proper share of indirect overhead?

A. All right, [307] now, we couldn't get any more out of the customer.

Q. Then you would have been better off not to go in the deal?

A. Then we would have been over there in the left hand column, without the pork, and you will notice that the cost of handling that milk in the top column is 40%, and the bottom column, without changing the operation except as to the pork, has dropped to 30½.

Q. As a matter of fact, you bought a lot of those hogs from others than co-op members?

A. Yes, indeed.

Q. And you paid them so much?

A. That is right, Seattle plus freight.

Q. Now, you figured out what you paid for it, and what the handling, operations expenses of that unit were, and you knew that they had to pay a proportionate share of the indirect overhead?

A. That's right.

Q. And it would amount to something?

A. Yes.

Q. And your operation resulted in loss?

(Testimony of Roland Snodgrass.)

A. For that department, but a profit for the Association, which appears over in the Dairy Department for that particular thing.

Q. How does it amount to a profit for the Association if you lost money on the transaction? The Association lost money on the transaction, didn't they?

A. No, sir, the Association made $40,000 on that particular transaction.

Q. Well, if the Association made $40,000 on that particular transaction, what is the materiality of all this? The Association [308] made money, then on the grocery store, too, didn't it, except for the indirect overhead? A. Yes, that's right.

Q. In the same manner? Is that a proper comparison? Now, the grocery department in '45 lost $20,000, didn't it? A. No, I don't think so.

Q. Well, was it the garage?

A. The garage, yes.

Q. Lost $20,000?

A. Oh, Mr. Grigsby, I admit there is a lot of inefficiency in this whole operation—losses that shouldn't have occurred. But there is this one thing: The shifting of one losing department may have created a much higher profit in another. It is simply a fluid thing about the books——

Q. Well, all right. You are taking an arbitrary figure and setting each department's share of the indirect overhead. Now, what are you trying to contend here when you charge the dairymen 27.40

(Testimony of Roland Snodgrass.)

per cent of the indirect overhead—that you didn't charge them enough? A. No.

Q. What is the point of all this, then? Now, your books show that in '45, on the proportion of the amount of business done, that the dairymen—the dairy-creamery—paid 27.40 per cent of your indirect overhead, didn't they?

A. Well then, it must have had that same percentage of the sales.

Q. Well, that's the figures, aren't they?

A. I don't know, but if you read them out of there I will agree to them.

Q. All right, Fiscal Year ending November 30, 1945: Dairy-creamery, operating profit before indirect overhead, $98,915.14. [309] Now, the indirect overhead consisting of Power House, Cabinet Shop and General and Administrative, is $128,653. Dairy-creamery indirect overhead per cent, 27.40 per cent. In figures, the dairy-creamery is charged with $12,220 for the power house, $9,521 for the cabinet shop, and something for G&A, which makes a total of about $45,000. If you will look at Page 19, can you state that the dairy-creamery was charged 27.50 per cent of the indirect overhead?

A. Well, I had thought it was higher. I thought it was 30 per cent.

The Court: Is that the 1945 audit?

Mr. Grigsby: Yes.

Mr. Davis: I think——

The Witness: Yes, 33½ per cent.

(Testimony of Roland Snodgrass.)

Mr. Grigsby: Then they are charged more. What is the 27.40, then?

A. Well, it states that it is operating profit before the indirect overhead. Now, actually, the figure you are shooting at is 33, I believe, Mr. Grigsby.

Q. Well, anyhow, the amount of indirect overhead charged to the dairy-creamery for '45, according to the statement that is in evidence here, is $45,-121.31? A. Uh-huh.

Q. So that would really be approximately 33 per cent of $128,653?

A. Uh-huh, because it had approximately 33 per cent of the total sales.

Q. Yes, and it is based on that?

A. That's right.

Q. Now, do you figure you didn't charge them enough? [310]

A. No, I figure this way: If we had by any means increased the total sales, that we would reduce the percentage which the creamery would have to stand and reduce the dollars which the creamery would have to stand.

Q. Do you mean as to the total sales of the Grocery Department?

A. Yes, if we reduced that we would reduce the overhead charge to the creamery.

Q. Now, in 1945 you made a certain amount of gross sales in the Grocery Department?

A. Yes.

Q. And you lost money?

(Testimony of Roland Snodgrass.)

A. Not until after the distribution of General and Administrative.

Q. Well, all right. You have got a right to charge them with some of the indirect overhead?

A. That's correct.

Q. And after you did charge it you lost money?

A. In the department.

Q. Yes? A. Uh-huh.

Q. Now, if you would have had a greater volume could you have made money? A. Yes.

Q. Even at the same prices?

A. Yes, we could.

Q. Now, you spoke this morning of marking up ten percent above cost price. You don't mean actually that you ever did that?

A. Well, I will give you an example over there in which we marked up five per cent above costs.

Q. Yes, but that is a pork transaction. Now, you never bought groceries outside and then marked up and sold them for ten [311] per cent plus the cost? You never heard of a grocery store running that way, did you?

A. Well, I won't say that we had done that. We mark them up a certain amount and then on some trade discount—for instance, if we sold to another store or a restaurant or some business in trade—we would give a ten per cent discount, which might amount to the same thing, but——

Q. Well, as a matter of fact, didn't you add on from 27 to 50 per cent to the cost price, same as

(Testimony of Roland Snodgrass.)

every other grocery store does—or perhaps more?

A. No, I don't think we did.

Q. Did you ever hear of a grocery store operating on the basis of an increase of ten per cent on the cost of the goods?

A. Well, you understand in figuring our mark-ups at that time—it was already done for us. In 1945 OPA was still effective and they had frozen the mark-up on what it had been when they originated. In other words, if we sold a thing—bought it for $2.00 and sold it for $2.50—the OPA allowed us—that is, if we had done that, say, in 1942—we made 50c on the item. Now, if in 1945 the item now cost us $4.00, we had to sell it for $4.50.

Q. Well, anyway, you say that if you could have increased your volume to a sufficient extent, that you could have made a profit in spite of your sharing of the indirect overhead?

A. Yes, we could so long as the mark-up was sufficient so that the actual cost of the transaction was less than the selling price.

Q. Well, all right. Now, in 1945 if you could have sold [312] more goods even at the price you did sell it, and enough more goods, it wouldn't have meant a loss, would it?

A. That is true on every department which shows this: That there was still a profit before the distribution of General and Administrative expense.

Q. Is that true of the Grocery Department?

A. I believe it is, but I should look at the audit to say so.

(Testimony of Roland Snodgrass.)

Q. What I am getting at, the more goods you sold in that Grocery Department the more money you made, even at the figure you sold it?

A. So long as it shows on that sheet there a profit before the General and Administrative.

Q. Well, all right. The other day you had a witness on the stand that said that the dairy farmers are responsible for six per cent of the loss of the grocery store in proportion to the amount of trade that they gave it.

A. Well, I don't doubt that.

Q. Well, if they deducted from their trade with you, they are responsible for that much more of your loss? If they didn't trade with you at all, you couldn't charge them with any of it—is that the theory?

A. I don't know the theory. I didn't set it.

Q. You heard the testimony here. Mr. Davis has Mr. Allyn on the stand and he proved by Mr. Allyn, the dairy farmers were responsible for a certain amount of the garage loss in proportion to the amount of patronage they gave the garage. They are responsible for a certain amount of meat loss in proportion to their patronage; and the grocery store, in proportion to the [313] patronage. Yet you say as the volume of business increases the loss is greater.

A. That is correct, with that one——

Q. Then they shouldn't be charged?

A. No, I believe they probably should be paid for it.

(Testimony of Roland Snodgrass.)

Q. So, so far as you are concerned you abandon the theory of an offset on our claim here on account of buying goods?

A. I didn't even advance the theory. That is Mr. Davis' theory.

Q. As a matter of fact, every member of this Association contracts to buy all his stuff where you got it at your stores, doesn't he?

A. I believe so, yes.

Q. And he goes there and he pays what you ask him for it? A. Yes.

Q. Now, I want to ask you this, Mr. Snodgrass: I should have asked you this morning: Of course, for 1945 you didn't make any additional payments, and used the $57,000 for cooperative purposes of one kind or another. You stated that that $18,800, approximately, that you had left over after making the additional payments for '44, you used to plug up different holes where you had a loss in the department. It was applied to that—that is in the books, is that right?

A. Well, I will put it this way: In effect, that is what happens to it.

Q. All right. In effect, that is what happens. Now, in 1945, for instance, here is the figure showing the dairy-creamery made a net profit of $57,001.58, and the Produce Department made a loss of $20,319.12. So you took this $57,000 and used part of [314] it to plug up that hole that was left by the loss in the Produce Department?

(Testimony of Roland Snodgrass.)

A. Shall we say, in effect, that is what has happened to it?

Q. Now, you paid the Produce Department $76,976.05 for the produce they sold you in 1945, and for that produce you received $101,697.97. So, you paid the Produce Department about 75 per cent of what you got for their goods? A. Uh-huh.

Q. Didn't you?

A. If that is what the figures show, I will admit it.

Q. (Handing paper to witness:) 101,000 is what you got for the goods; 76,976——

A. I think that is correct.

Q. Now, with relation to the milk and dairy products, you received for the goods $361,145.56, and paid for the goods $178,422.88, which is a little less than half? A. I think that is about right.

Q. Well, that is what comes under the head of "advances." As a matter of fact, they never advanced the dairymen anything, did they? You just described how they bring their milk down there and deliver it to you, and you measure it, is that right?

A. We paid for it at a certain rate.

Q. Just a minute—let me ask the question: They bring their milk down there and deliver it to you at Palmer? A. That is right.

Q. Or you go get it and take it down. Anyway, it is delivered to you at Palmer, isn't it, and weighed? A. That is right.

(Testimony of Roland Snodgrass.)

Q. Then you pay them every two weeks?

A. That's right.

Q. For instance, if I brought milk there today I wouldn't get paid for it for two weeks?

A. That is correct.

Q. And that is after you sold it?

A. Yes, but it is probably on charge account, most of it, not paid until the end of the month.

Q. But you have sold it?

A. All right, we have sold it.

Q. Now, you haven't made them any advance, have you?

A. That is just a matter of terminology. In one way it is and in one way it isn't.

Q. Now, you have a right under this contract to charge them interest on advances?

A. I believe it is in there.

Q. Under this contract, under Paragraph (4):

"The Association agrees that upon delivery of agricultural products hereunder it may make or cause to be made through its Management and Sales Agency such requested advances to the Producer on said products as in its discretion may be justified by the Producer's immediate needs and by marketing conditions."

A. Uh-huh.

Q. So, a man delivers milk on the first of the month; you don't pay him for it for two weeks; and it is sold by that time, isn't it? You know at least what you are getting for it by that time, don't you—whether it is on a charge account or not?

(Testimony of Roland Snodgrass.)

A. You know what it is billed out at.

Q. What's that?

A. You know what it's sold for, subject to collection. [316]

Q. You know what you are getting for that milk, so you are safe in giving him an advance of 40 per cent or 50 per cent?

A. You are safe about to that point.

Q. But now when a farmer brings in potatoes, you don't know just when you are going to market them, do you? A. That's right.

Q. And you don't know whether they are going to spoil?

A. You don't know how many are going to spoil.

Q. Or whether you will have an over-supply?

A. That is right.

Q. So, you use your judgment in your advance to the farmer? A. That's right.

Q. And in '45 you used your judgment and advanced them 75 per cent. That's true, isn't it?—The figures I just showed you?

A. Yes, I believe you can say that is true.

Q. And it cost you—you received 101,000 for his product, which was much less than you expected to receive, of course, wasn't it?

A. I think that is right.

Q. If you had known you weren't going to get but 101,000 for all that stuff—you paid $76,000—you wouldn't have advanced that amount, would you?

(Testimony of Roland Snodgrass.)

A. That's right.

Q. But you charged him with $4,000, approximately, of indirect overhead, didn't you?

A. With whatever figure is shown there. Well, if it is there I will agree to it.

Q. You charged the farmer—the produce farmer—$4,995.62 of indirect overhead.

A. All right. [317]

Q. You charged him $40,045.42 operating expense? A. Uh-huh.

Q. And that left you in the hole on that deal of $20,319.12. A. I think so.

Q. And that could have been because you couldn't find a fair market for the potatoes, or—but the fact is you advanced him too much money which you wouldn't have advanced him if you could have looked forward to what happened?

A. I think that is right.

Q. So, it left you in the hole on your deal with the farmers $20,319.12?

A. I think that is correct.

Q. And you took this $57,000 the dairy made and plugged up the hole?

A. That is what happened, as I said.

Q. That is just exactly what happened in this transaction, and then you didn't have it left to pay the dairymen with? A. I think that's right.

Mr. Grigsby: That's all.

(Testimony of Roland Snodgrass.)

Recross Examination

By Mr. Davis:

Q. Now, I will repeat the question I asked you awhile ago, since Mr. Grigsby brought it out: When we are talking here about the produce dealers, you are talking about the goods that were sold to the public, is that right? A. Produce dealers?

Q. Yes—I mean your produce, in your Produce Department: When we are talking about gross sales price, that's the gross sales price of the produce that was sold, isn't it?

A. Yes.

Q. When you are talking about the gross sales price of the [318] milk that is the amount received from the ultimate consumer?

A. Yes. These are both total sales or the average sales price. There can be two things there.

Q. All right, now: The milk dealer—the milk producer—let me withdraw that. Relatively all, if not all, of the milk was sold to the ultimate consumer? A. That is right.

Q. That isn't necessarily true of the produce?

A. It wasn't in that year at all.

Q. Considerable of that produce never went to the ultimate consumer at all? A. That's right.

Q. So that the effect was that the milk farmer, per unit, received a good deal more for his product that he had sold than the producer-farmer received per unit for the produce that he sold?

A. Yes. I could give you ranges which would be somewhat estimates, but I could find places where

(Testimony of Roland Snodgrass.)

these have happened: The produce farmers in some commodities may have got only 20 per cent of what his commodity was selling for due to—oh, surplus. That is, we might buy a thousand pounds at 20c a pound, if it were radishes, and sell only 300 pounds at 30c. Such a thing as that could happen. Or we could sell—we could buy 10,000 pounds at 20c and sell 300 pounds at 30c a pound. In other words, the radish men might have got 75 per cent, or he might have got only 15 or 20 per cent of the selling price of his commodity, depending on whether or not there was a surplus.

Q. Now, assuming, as Mr. Grigsby has had you testify here, [319], that the produce dealer in 1945 did receive 75 per cent of the amount the consumer paid, that doesn't mean necessarily that he received more money for the product he sold per unit than what the dairymen did, does it?

A. No, that doesn't.

The Court: You mean the product he sold, Mr. Davis, or his product that was ultimately sold?

Mr. Davis: No, I am talking about the product he sold to the co-op. In other words, when we have a surplus, then there occurs a loss. The produce farmer might get all of the consumer's dollar and still get a very small amount per unit for the produce he sold to the co-op. Whereas the milk producer all the way through here has been receiving 50 per cent or better of the consumer's dollar, and the consumer's dollar in that case is also the same figure as the amount he sold to the co-op.

(Testimony of Roland Snodgrass.)

The Court: May I ask a question there? Did you on any, or many, occasions receive produce, such as cabbages and radishes and so on, from the producers, for which you made no payment at all?

The Witness: There would not be many occasions like that.

The Court: The total amount would be insignificant?

The Witness: Yes, because of the fact that although we might have received $10,000 worth of cabbage and sold only $1,000 worth of cabbage, we would feel that whether they threw the last batch of cabbage to come in away or not, that he is entitled to approximately the same amount as the other producers. [320]

The Court: Very well. You may go ahead.

Mr. Davis: Now, to carry that one step farther: Supposing that a man sold 10,000 pounds of cabbage. Supposing you say you sold 1000 pounds of cabbage. Now, supposing the farmers got all the money that the consumer paid for that cabbage, they still are getting paid for 10,000 pounds of cabbage on a basis of 1000 pounds, aren't they?

A. Yes, that as an illustration is what happens.

Q. Where your milk producer, where all the milk is sold, is always getting paid for a hundred pounds of milk—when a hundred pounds of milk is sold to the co-op he receives pay for a hundred pounds of milk? A. That is correct.

Mr. Davis: I think that illustrates the point I was trying to get at awhile ago.

(Testimony of Roland Snodgrass.)

The Court: That is all.

Mr. Grigsby: Just a minute.

Redirect Examination

By Mr. Grigsby:

Q. In 1944 the sales of the Produce Department were $268,806.78? A. That is right.

Q. Two and a half times as much as in 1945?

A. I think that is about correct.

Q. That year it paid better to be produce farmer than it did in '45, didn't it?

A. Oh yes, decidedly.

Q. Now, as a matter of fact, the produce farmers didn't [321] make any money in '45, did they, themselves?

A. Well, I couldn't say about that. Some, perhaps, did; some perhaps didn't.

Q. Well, very little, didn't they?

A. Well, it is quite a question. If you use the collective farmers or individuals, some did or some didn't. As a whole they didn't make as much.

Q. And as a whole the co-op lost money on it?

A. That is obvious.

Q. The dairy farmers did make money, in '45?

A. Yes, they did.

Q. And the co-op made money on it?

A. That's right.

Mr. Grigsby: Can we take the afternoon recess at this time?

The Court: Court will stand recess until 2:50.

(Testimony of Roland Snodgrass.)

(Whereupon recess was had at 2:40 o'clock p.m.)

After Recess

The Court: Are both parties through with Mr. Snodgrass?

Mr. Grigsby: One more question from Mr. Snodgrass.

The Court: Will you take the stand again, Mr. Snodgrass?

(Witness resumed the stand.)

Mr. Grigsby: Referring back to that 18,800 and some odd dollars that was held out, or remained from the net profits of the creamery and dairy for the 1944 production, after paying additional payments of 20 per cent and 21.125, was there any agreement made with the dairy farmers that that amount should be held out, or was nothing said about it?

A. I believe that there was nothing said about it. [322]

Q. They seemed to be satisfied? That's all.

A. Well, it's altogether in a sort of negative sense. They have raised no objection and they always come in at the audit and see the figure is there. So it shows—

Q. They have the legal privilege of coming in and seeing it? A. That's right.

Mr. Grigsby: That is all.

(Testimony of Roland Snodgrass.)

Recross Examination

By Mr. Davis:

Q. Mr. Snodgrass, outside of the marketing agreement was there ever any agreement with any of the milk producers as to how the proceeds were to be distributed—outside of the marketing agreement itself?

A. There is no formal agreement. There have been enough discussions to say that there are perhaps a dozen different understandings, but there is only the one formal agreement.

Mr. Davis: That's all.

The Court: Wait just a minute. Before Mr. Snodgrass leaves the stand, I think it would be well to have Mr. Snodgrass put on a sheet of paper what appears on the blackboard here, and for purposes of illustration only it will be admitted in evidence as Defendant's Exhibit No. 5.

DEFENDANT'S EXHIBIT NO. 5

Illustration of a Principle Operative in the Books of the Association

	P & L, Creamery & Dairy	P & L, Meat Dept. (Pool)	
Total sales	$1,000,000	$1,000,000	
Cost of goods	600,000	700,000	
Gross profit	400,000	300,000	
Operating expense	200,000	250,000	
Net profit before G & A	200,000	50,000	(Increase
G & A expense	200,000	10,000	(due to
Profit or loss	.....	40,000	(transac-(tion.

(Testimony of Roland Snodgrass.)

Co-Op P & L as Per Audit

Total sales	$2,000,000
Cost of goods	1,300,000
Gross profit	700,000
Operating expense	450,000
Net profit before G & A	250,000
G & A expense	210,000
Profit or loss	40,000

Breakdown of Audit to Departmental P & L's

	P & L, Creamery & Dairy	P & L, Meat Dept. (Pool)
Total sales	$1,000,000	$1,000,000
Cost of goods	600,000	700,000
Gross profit	400,000	300,000
Operating expenses	200,000	250,000
Net profit before G & A	200,000	50,000
G & A	105,000	105,000
Profit or (loss)	95,000	(55,000) Loss

[Endorsed]: Filed August 5, 1948.

Mr. Davis: I think this is the same, Mr. Snodgrass, that you worked out previously.

A. Yes, except that it doesn't have titles. I will be glad to do this. [323]

The Court: You can do it after you leave the witness stand. Just put down on a sheet of paper whatever appears on the blackboard, and then it will go in the record if an appeal is taken in the case. Otherwise the whole thing is lost.

The Witness: Yes. May I point out that the $10,000—the sixth figure down on the right hand

(Testimony of Roland Snodgrass.)

side—is the increase in the G&A expense due to this particular transaction.

The Court: You so testified. I do not know whether it appears on the blackboard or not. You can write in your sheet of paper that this is the increase of G&A expense on account of that transaction so as to identify it. That is all, Mr. Snodgrass. Another witness may be called.

Mr. Grigsby: Mr. Huntley.

WALTER E. HUNTLEY

being first duly sworn, testified for and in behalf of the plaintiff as follows:

Direct Examination

By Mr. Grigsby:

Q. State your full name?

A. Walter E. Huntley.

Q. You are one of the claimants involved in this law suit? A. I am.

Q. When did you start selling milk to the co-op defendant corporation?

A. I am not sure of the exact date, but it was about four or five years ago.

Q. And I will ask you—I don't think you were here during [324] the trial—did you sell your milk and receive a current payment every two weeks during the time you sold it?

A. That is right.

(Testimony of Walter E. Huntley.)

Q. And the following year after the audit would you receive additional payments?

A. Sometimes one; sometimes two payments.

Q. Do you know what's the first year you got those additional payments?

A. I don't remember.

Q. Have you any vouchers for them?

A. I have two vouchers, yes.

Q. Do you know for what year this voucher was?

A. I am not sure—either '43 or '44.

Q. Well, is one of them for '43 and one for '44?

A. I don't know for sure.

Q. You don't know? These are all the vouchers you have been able to find, are they?

A. That's all that I have found, yes.

Mr. Grigsby: We offer these in evidence as one exhibit, Mr. Davis. (Handing them to Mr. Davis.)

Mr. Davis: That is about No. 14, your Honor?

Mr. Grigsby: 15, I guess.

The Court: 17. They may be admitted and appropriately marked as Plaintiff's Exhibit No. 17.

(Plaintiff's Exhibit No. 17 admitted in evidence.)

(Testimony of Walter E. Huntley.)

PLAINTIFF'S EXHIBIT NO. 17

Remittance Advice—No Receipt Required
Matanuska Valley Farmers Cooperating Association

Date of Invoice	Description	Gross Amt.	Discount or Deduction	Net Amt.
	Second milk pool advance			
	Total amount purchased $3260.89			
	20% of dollar value purchased	$652.18		
	Less 2% statutory reserve	13.04		
	Amount of second advance			$639.14
*	* * * * * * * *			
	Final payment—milk and cream pool			
	Total amount purchased $3260.89			
	22.579% of dollar value purchased	$736.28		
	Less 2% statutory reserve	14.73		
	Final payment			$721.55

[Endorsed]: Filed August 5, 1948.

Mr. Grigsby: Now, Mr. Huntley, do you recall that in 1945 [325] you received a payment of 20 per cent on what you had already been paid, followed by another payment of 21.125?

A. What year was that?

Q. In 1945, for the production of 1944?

A. I do recall that, sir.

Q. Now, you have heard it testified to here today—a reference made, anyway—to some $18,000 odd retained by the co-op out of the net profits of '44 after making those additional payments? Did you hear that testimony? A. I did.

Q. Did you know—when did you first know that they retained that? A. Today.

Q. When you were paid off in '45—your final

(Testimony of Walter E. Huntley.)

payment on what was called the milk pool of '44—did you assume, or did you know there was anything left of the net profits of the creamery-dairy?

A. I did not.

Q. What was your idea as to what had become of all the net profits?

A. I thought that all the net profits were being paid to the producers.

Q. And why did you think that?

A. It never occurred to me to question it.

Q. You mean you had confidence in their—

A. I did. I thought we were a group of honest individuals and that everything was above board.

Q. Was it your understanding that time that you were entitled to all the net profits of that particular unit?

A. It has always [326] been my understanding that the members of the co-op were entitled to all the net profits.

Q. Of the sale of their particular product, you mean? A. That's right.

Mr. Grigsby: You can take the witness.

Cross-Examination

By Mr. Davis:

Q. Just two questions, Mr. Huntley: You are not farming any more, are you?

A. Yes, we have a farm left.

Q. Are you a member of the Matanuska Valley Farmers Co-op now? That's right, I am.

(Testimony of Walter E. Huntley.)

Q. And you were also such member at the time that you sold your milk in 1945?

A. That's right.

Q. You at one time, I believe, were a member of the Board of Directors? A. That's right.

Q. What year was that? A. 1938 and '39.

Q. Prior to the time that we have any reference to here? That's right.

Mr. Davis: That is all, Mr. Huntley.

Redirect Examination

By Mr. Grigsby:

Q. One other question, Mr. Huntley: Were you present at a meeting of the dairymen that were involved in this, or some of them—involved in this law suit—and some members of the Board of Directors of the co-op discussing this situation last [327] spring about the first of April?

A. I was not.

Q. You were not? That's all.

The Court: That is all, Mr. Huntley. Another witness may be called.

Mr. Grigsby: Mr. Allyn.

MARVIN ALLYN

heretofore duly sworn, resumed the stand and further testified as follows:

Direct Examination

By Mr. Grigsby:

Q. Mr. Allyn, did you get the figures of the amount, under this item of cost of goods sold in 1945, creamery and dairy, of approximately $178,000 —did you get the amount of eggs you purchased?

A. I am sorry, I didn't get that. When the claimants came in on Saturday we looked up a figure which I, in their presence, took to be the previous accountant's figure. Now, when we compared it with our others we find that that was subject to some adjustment and this morning, looking up these other figures you asked for—I am sorry, but I was not able to trace that back and correct that figure.

Q. Do you know approximately what you paid for eggs in '45?

A. I don't. The figure which I gave them is obviously subject to adjustment.

Q. And have you been able to—in the time you have had—to get the breakdown of this approximately $42,000 that you paid [328] for goods outside of milk?

A. If you recall, I spoke to you after the last meeting, explaining that my reasons—which I had pointed out to the Court—and you told me that

(Testimony of Marvin Allyn.)

unless I heard for you that it wouldn't be necessary.

Q. Well, you did hear from me, didn't you?

A. On Saturday. I believe it was Saturday.

Q. Well, anyhow, you haven't got it?

A. No.

Q. You haven't attempted to show where that extra $42,000 went? A. No.

Q. Have you at this time any way, from any information you received down there—other than an approximate guess—of showing what the creamery made in '45, in profit?

A. What the creamery made? From the audit I made a separation on the basis of the settlement in 1944.

Q. By the settlement in '44, you mean the result whereby the co-op held out some $18,000 of the net profits of the creamery-dairy? Is that what you call a settlement?

A. No, the separation—the mechanics of a separation—as between dairy and creamery within that department.

Q. Well, was there—was that worked out? Was there a separation? Did you, or was it figured out for the year 1944, what the creamery made in '44, without anything from which to figure it out?

A. They developed a work sheet, and caluculated back from the audit, and split this department and then as best they could they separated the department into creamery-dairy to [329] get back to the earning on the bottled milk.

(Testimony of Marvin Allyn.)

Q. Well now, can you state today that any figre, positively, is a profit made by the creamery branch of the creamery-dairy in 1945? For instance, assuming they sold a lot of ice cream mix to the Army out here? A. Yes, I can—

Q. Do you know what they made on that ice cream mix? A. Not on the ice cream mix.

Mr. Davis: You can get your figures, if you want to, Mr. Allyn.

Mr. Grigsby: All right, get the figures.

(Witness left the stand briefly.)

The Witness: You asked for the creamery?

Mr. Grigsby: The ice cream mix.

A. No, I have no profit on ice cream mix.

Q. Have you anything there showing any profit on eggs? A. No.

Q. Ice cream? A. No. Those are these manufactured products which, of necessity, had to be lumped together.

Q. Then you can't state that they made any profit in 1945 on the creamery?

A. Then on the bottled milk either. Collectively we did.

Q. But you know what you paid for the milk to the farmers and what you sold it for?

A. That's correct.

Q. It has been testified here that in a certain period in 1945 they paid the farmer 13c a quart for it; another period 14c a quart; another period 15c a quart; another period 16c a [330] quart, and that

(Testimony of Marvin Allyn.)

they received from 20c in Palmer, 26 from the Fort, up to 30—that is the consumer price. So you got those figures? A. That's right.

Q. And you know there was a profit on bottled milk, don't you? Must have been according to those figures? You have got the cost of handling here set down in your books? A. That's right.

Q. And the indirect overhead? So you know that they made a profit on bottled milk, don't you?

A. Yes.

Q. You don't know that they made a profit on the creamery products?

A. In the same way that we know that we had an earning on bottled milk. You can't question one without questioning the other.

Q. Well, you haven't got the figures here on what you paid for powdered milk, have you?

A. Not by specific products.

Q. What?

A. By subtraction we know how much we paid for all the purchases and supplies in manufacturing.

Q. Yes, you know that you paid $42,000?

A. That's right.

Q. Do you know what you paid for powdered milk? A. No.

Q. Do you know what you paid for butter?

A. No.

Q. For eggs?

A. No. The figure on eggs, being a purchase from the farmers, is available.

(Testimony of Marvin Allyn.)

Q. Well, how soon can you get it? Tomorrow morning? A. I can try.

Q. Well, can you get any of the other figures?

A. If we are rather late getting in there—rather late tonight—it will [331] mean looking up tonight—

Q. Well, all right, if you don't want to look it up, that's all.

A. For the Court's benefit I would like to explain that the clerks who are familiar with these old records will not be there, having gone home at five o'clock tonight. Some of these records are in the archives with which I am not familiar.

The Court: Mr. Allyn, is there any record from which you can readily ascertain the amount of milk which was used in the creamery in 1945 as distinguished from the amount sold in bottles or otherwise?

The Witness: That can be estimated by, I believe, perhaps, with the working of Mr. Snodgrass—if we can find a figure for it—a volume figure for ice cream made—by working back the formula we can get an estimate.

The Court: In other words, you know how much ice cream was made and you can say so many pounds of milk—?

The Witness: If that quantity of ice cream sales is available, we know our formula and we could work that back and get an estimated figure.

The Court: So far as you know, there is no readily available figure which will tell how many

(Testimony of Marvin Allyn.)

quarts or pounds or gallons or tons of milk were used in the creamery in the making of ice cream and other products in 1945?

The Witness: Not to my knowledge, sir.

Cross Examination [332]

By Mr. Davis:

Q. As a point of beginning, Mr. Allyn, all of Grade B milk was supposed to have gone in manufactured products? A. That is correct.

Q. And you could determine the amount of Grade B milk that was purchased in 1945?

A. That is correct.

Q. How much Grade A milk went into manufactured products and how much bottled you don't know and there is no way of finding out?

A. That's right.

Q. Now, you told Mr. Grigsby you couldn't determine as of now the amount that was paid for ice cream mix, or for eggs, or for these other items. Can you tell him the amount that the aggregate of them amounted to? A. $45,231.72.

Q. Now, when the manufactured products are sold through the dairy here in town, if they are sold for cash they are all mixed up with cash sales of bottled milk? A. That is correct.

Q. So it is impossible to tell from the cash sales how much of the cash sales amounted to ice cream and how much amounted to milk, for instance?

A. That is correct.

(Testimony of Marvin Allyn.)

Q. But by taking the charge sales, can you establish a trend, to show how much—about what percentages of sales to the public were ice cream and manufactured products and how much were bottled milk? A. Yes I have that.

Q. Can you give us the proportion of manufactured products to bottled milk on those charge sales? A. On the charge sales? [333]

Q. Yes. We can't find it, now, on the cash sales?

A. The cash sales on the basis of the charge sales?

Q. All right, the cash sales on the basis of the charge sales?

A. We estimate that 78 per cent of the cash sales were for bottled milk and 22 per cent for manufactured products.

Q. Now, from what you have seen of these figures, going over these figures, do you have any reason to believe that the creamery—try and distinguish it, now, from the dairy—that the creamery lost money and the dairy made it, or the other way around? Or is it your conclusion they both made money?

A. It is my conclusion they shared in the net earnings of the department; that of the net income of $57,000 that the creamery—the manufactured products—accounted for $33,113.98, and that the bottled milk accounted for $23,887.60. That is, I repeat, folowing the mechanics the way the separation was made by the previous accountant in 1944 and which was accepted.

(Testimony of Marvin Allyn.)

Q. That is the same thing you testified to two or three weeks ago? A. Correct.

Q. That by using the same formula and by applying to it the 1945 figures, you come out with these figures as to the breakdown between the creamery and the dairy? A. That is correct.

The Court: What are the figures again?

Mr. Davis: Would you give them again.

A. For the creamery, $33,113.98, and for the dairy, $23,887.60.

Q. Now, where have you put that rent? Would you [334] put that under dairy or creamery, or neither? A. That is in the creamery.

The Court: Pardon me, Mr. Allyn: On March 14 I made what appears to be a clear note saying that—I will read it:

"Allyn estimate: On basis of calculation made for 1944, profits for 1945 of creamery, $20,457.87; dairy, $36,543.71," making a total of $57,001.58. And on the margin I wrote: "Figures for 1945 on basis of 1944." The figures today are totally different.

The Witness: Those figures were amended and in favor of the creamery. (Witness again took something from brief case at counsel table.) I beg your pardon, in favor of the dairy. I may have an earlier —I thought that these figures that I brought with me were the corrected figures.

The Court: Well, if you wish to make further examination of the figures, we can suspend this to a later time. You may go ahead, Mr. Davis.

(Testimony of Marvin Allyn.)

The Witness: Did we submit that schedule in evidence?

The Court: I think not, because otherwise I wouldn't have made a note of it.

Mr. Davis: I don't think we did either.

The Court: I made the note and may have made an error in making the note, but it seems reasonably clear to me now that you did so testify.

The Witness: There was an adjustment [335] made when I found an error that I had made in following his, and I corrected figures, but I thought that I had the corrected figure here.

Mr. Davis: Well, do you know at this time which is the correct figure, the one you gave the judge before or the one you gave now? If you don't know, I will ask for further time for you to prepare them so you can present the correct figure to the Court.

A. I wish to do that.

Mr. Davis: You Honor, may I have that?

The Court: Very well, that may be taken up later.

Mr. Davis: I think the figure you gave before was the corrected figure. I think you have gotten hold of an old sheet today. That is all, Mr. Allyn.

Redirect Examination

By Mr. Grigsby:

Q. Mr. Allyn, you said awhile ago something about the gross receipts from bottled milk being 78 per cent as to 22 for ice cream and creamery products. A. Of cash sales.

(Testimony of Marvin Allyn.)

Q. Of cash sales? A. Yes.

Q. Based on charges, isn't it.

A. An examination of charge sales slips which, of course, shows the product.

Q. Well then, your gross receipts for bottled milk is 78 per cent of the total receipts from the creamery-dairy, isn't that right? And the creamery 22 per cent—that's gross?

A. On the basis of a charge sale, that appears to be true.

Q. Well, still you say that the creamery, [336] according to the figures you first gave his Honor, made about—what is their figure, $21,000?

The Court: You mean the figure given on March 14?

Mr. Grigsby: Yes.

The Court: Creamery made $20,457.87, according to the note that I have here.

Mr. Grigsby: Now, you said the other day, and you say now, that that is based upon some kind of a calculation you made for the operations of 1944?

A. Made by a previous accountant.

Q. Something with reference to—according to the settlement of 1944? Did you say, settlement of 1944?

A. I used that term. It may have been ill chosen.

Q. Did you mean agreement, by that word, between the dairy producers and the co-op?

A. It was the accountant's work paper.

Q. Well now, in doing that—in getting up that

(Testimony of Marvin Allyn.)

work paper to try to find out what the creamery made in '45, why didn't you apply that system to '45 instead of to '44, and then base it on '44? They had the same system of bookkeeping down there in '44 and '45, didn't they?

A. I think that point was made, that the mechanics were established for the 1944 fiscal year, which I adapted the figures and applied the same system to 1945 operations.

Q. Well, did you ascertain then, when you took those mechanics that you applied to '44, what the creamery made in 1944—in figures.

A. Well, that was done the previous year. [337]

Q. Well, have you got that somewhere?

A. In 1944?

Q. Yes, what the creamery made in 1944—the net profit?

A. I do not have that work sheet—yes, I have, too.

Q. Now, have you a work sheet there showing what the creamery made in 1944?

A. According to this separation in 1944 the creamery earned—apparently earned $14,607.24.

Q. And in arriving at that, have you charged the creamery with their proportion of general administration expenses — segregated it from the dairy? A. General administration?

Q. Yes, have you segregated their proportion of their expenses that is charged on the books to dairy-creamery? A. That is correct.

(Testimony of Marvin Allyn.)

Q. You have deducted that?

A. That is correct.

Q. And also the operating expenses?

A. That is correct.

Q. And what is the proportion of the indirect overhead—what's the figure you charged to the creamery part of it for 1944?

A. It appears to be $4,380.11.

Q. And what's their operating expense?

A. $15,458.68.

Q. May I look at that sheet?

A. Uh-huh. It will take some figuring out. Here is the calculation that was used.

Q. Is there any item in there showing you what you paid for eggs?

A. What they paid for eggs?

Q. Not powdered eggs, but—

A. In purchases? No.

Q. Anything there showing—

A. These are sales, and here are your cost of goods [338] sold.

Q. You just got the total cost of goods sold?

A. That is correct.

Q. But you don't know what they paid for powdered milk? A. No.

Q. What is the total cost of goods sold?

A. Total cost of goods sold for the department?

Q. To the creamery part?

A. That would be $23,648.67.

Q. Now, you gave the figure 45,000 awhile ago as the cost of goods sold. What was that?

(Testimony of Marvin Allyn.)

A. 45? I believe that was the seperation as between the dairy and creamery allocated on the same basis as this.

Mr. Davis: For what year?

The Witness: For 1945.

The Court: I still do not understand what the amount of $45,231.22 represents. I evidently missed part of your testimony. In answer to one of Mr. Davis' questions you gave that figure.

Mr. Grigsby: That's what I was asking about.

A. That is coming back to this figure which I gave which we are now questioning—this report, which I am afraid I have the original figures, which differs with yours.

The Court: What, in your present judgment, does the $45,231.22 mean? What does that indicate?

The Witness: That is the cost of goods sold, which, on the basis of the available records and in the judgment of the accountant and manager, should be charged to the ceramery department. [339]

The Court: That includes milk, eggs and everything else—cost of goods sold?

The Witness: Ice cream—yes.

The Court: The elements that go into ice cream?

The Witness: That is right.

Mr. Grigsby: Now, Mr. Allyn, your audit for 1945 shows the cost of goods sold, creamery-dairy, $178,422.88. A. That is correct.

Q. And you gave us the figures that of that $136,131 was paid to the milk producers?

A. Yes.

(Testimony of Marvin Allyn.)

Q. Which leaves about $42,000 the cost of all other goods. Now, you say it is 45,000 and something?

A. Well, that is this—this correction I made in my calculation, which I am going to check up for you and present.

Q. And this isn't right, then?

The Court: You had better show it to the witness.

(Mr. Grigsby handed paper to the witness.)

The Witness: Now, you are questioning—these figures are correct.

Mr. Grigsby: All right, the total cost of goods sold is $176,422? A. Yes.

Q. Of that $136,313 was paid to the milk producers?

A. It is this separation of—trying to break these down.

Q. Well, that is what I am trying to do now.

A. As between the dairy and creamery is where we [340] are running into the difficulty and I am questioning these figures.

Q. Well, this shows approximately $42,000 paid for goods besides what you bought of the dairy farmers? A. That's correct.

Q. And you have 45 there. I was just trying to account for that discrepancy; that's all.

The Court: That is all.

The Witness: Well, we are using a different

(Testimony of Marvin Allyn.)

figure there. Now, what we call—of the 178,000, you arrived at that 42,000 by a process of subtraction.

Mr. Grigsby: Yes. And I am splitting it on the —subtracting here the manufactured products and the creamery, and I believe that I will bring you a figure which will agree with that when I get my corrected figure.

The Court: That is all. Another witness may be called.

Mr. Davis: I would like to just let that ride, your Honor, until we find out whether the figure he previously gave you or the one today is the correct figure.

The Court: Mr. Allyn may be recalled later.

Mr. Davis: At this time, before you call another witness, I would like to present to the Court Mr. Snodgrass' copy of what is on the blackboard for illustration of Mr. Snodgrass' testimony.

The Court: Well, Mrs. Annabel, will you compare these figures, and if they are correct, mark that sheet of paper as Defendant's Exhibit No. 5, given to illustrate the testimony of the witness [341] and reproduce on paper what appears on the blackboard.

You may go ahead.

Mr. Grigsby: Mr. McAllister.

FRANK McALLISTER

heretofore duly sworn, resumed the stand and further testified as follows:

Direct Examination

By Mr. Grigsby:

Q. Mr. McAllister, do you recall calling at the co-op office, in 1945, or '46—you can call my attention to the date later—and making an inquiry as to what the creamery made in '45?

A. I do. It was in 1946—the spring of 1946. It was right after, or shortly after the books were audited and we had found out that there was no money—or there wasn't going to be any pay out of what we had coming in the pool, and there was—I met with the Board, I think, three times and we kept discussing this and inasmuch as I had heard indirectly at different times, especially ice cream mix which was sold to the Army, they had made—the co-op had made application to the OPA to increase the price of ice cream mix to the Army, and according to the head of the OPA there, who—it was a Mrs. Johnson—got up in the meeting—we had a regular meeting there—and stated that this application had been made and they would give the forms to the management to fill out, but that's the last she had ever heard of it. So the price of ice cream mix hadn't been increased, and [342] as I understood it at that time—it was told to me there in the office — that they were selling, aproximately, ice cream mix to the Army for $1.90 and it was costing

(Testimony of Frank McAllister.)

them $1.80 to manufacture it, leaving about 10c balance on the ice cream mix. And I questioned at the time that they had made any money and I still —on the ice cream or ice cream mix either.

Q. Well, did you ask in the office what they had made for 1945?

A. I did. That was—then after this discussion, that's when I asked them what was made. At that meeting they didn't have it available for—or they didn't give me the information of what they could make. But then I was called on a committee to meet with part of the Board to discuss ways and means of clearing up this question of the pool, and at that time, then, Mr. Harrington, who was the former accountant, stated that they had made a little over $4,000 in the ice cream and ice cream mix. That was the figure that he gave there. And Mr. Stock and Mr. Linn and Mr. Harrington—we were all on a committee, and I think there was one more party on that committee, but I don't recall just who it was, but it is in the record, though. But that is the statement that our former accountant made, that he figured, on some basis—I don't know what figure basis he figured on—that they had made over $4,000. They must have the record on that somewhere.

Q. 4,000 for ice cream and ice cream mix? Did that include any of their other products of the creamery, or all of them? [343]

A. Well, he didn't state whether or not that was eggs. As far as I recall, there was no—

(Testimony of Frank McAllister.)

Q. But I mean any other products?

A. No other products but ice cream and ice cream mix and popcicles.

Q. That's what I am alluding to.

A. In other words, all other manufactured products they designate as creamery, with the exception of eggs. I don't recall whether or not eggs—

Q. That auditor—what was his name?

A. Harrington. He was the former accountant—the accountant at that time.

Q. And he gave you this information at a meeting between you and, you said, some of the Board of Directors?

A. Yes, it was a committee.

Q. A committee from where—the dairymen?

A. Well, after I had met with the Board they decided to form a committee to go over this pool situation and figure out if there was—what we was after in the first place was to find out if some method could be set up to prevent a reoccurrence of the losses in '45, and that was the reason this came out. And in questioning what was made in the ice cream and ice cream mix, or what they called the creamery up there, he estimated that that was what they made.

Mr. Grigsby: That's all.

The Court: Counsel for the defendants may examine.

(Testimony of Frank McAllister.)

Cross Examination

By Mr. Davis:

Q. Mr. Harrington is the one whose place Mr. Allyn [344] took? A. I believe so.

Q. He was the accountant at the co-op?

A. He was the accountant.

Q. And this conversation took place at a meeting between a committee and the Board of Directors?

A. It was between myself, and Mr. Harrington and two members of the Board of Directors.

Q. Do you remember who the two members were?

A. Mr. Stock was one of them and I am sure Frank Linn was the other.

Q. Can you give us the approximate date, Mr. McAllister?

A. Well, I have a letter that I sent to the Board over this question (looking into his pockets). It has a date on it. And that meeting was shortly after—March 20—it's right around March 20. I gave them a letter on March 4 and told them action would be taken if nothing was done before March 20. So it was right around that time.

Q. That is 1946? A. Yes.

Q. Is it '46 or '47? A. '46.

Q. That's all.

Mr. Grigsby: That's all.

The Court: That is all, Mr. McAllister.

Mr. Grigsby: If you Honor please, with the exception that I was given a little different figure,

which is put in evidence here—Defendant's Exhibit 3 is a statement of the amounts paid to the claimants here in cash for the milk they delivered in 1945, which varies a little from the statement [345] I put in evidence as having been furnished me, and also varies for the reason that Harold Thuma has not been proved to have assigned his claim, and also varies slightly in some other particulars. Now, this morning, Mr. Snodgrass testified that should the Court find that the milk producers are entitled to the amount sued for, or some other amount, that that should be apportioned according to the—prorated according to the quantity of milk sold for which cash was paid the same as the 20 per cent payments were apportioned, which is based upon the cash paid, which is the same as the 21.125 per cent. In other words, your Honor, if we recovered for $57,000 that would be apportioned according to the amounts the farmers have already received for their milk, and with the exception of making that computation so as to have it in figures, we are ready to rest.

The Court: That is a matter of argument. I think counsel can make the computation or have it made for him and present it in the form of a statement or brief.

Mr. Grigsby: Yes, it is really in evidence except the final result, your Honor.

The Court: Yes, that can be made—

Mr. Grigsby: Very well, then; we rest.

The Court: Witness for defendant may be called.

Mr. Davis: I would like to call Mr. Eckert, your Honor.

The Court: Mr. Eckert may be sworn to testify.

VIRGIL ECKERT

being [346] first duly sworn, testified for and in behalf of the defendant as follows:

Direct Examination

By Mr. Davis:

Q. Mr. Eckert, will you state your name please?

A. Virgil Eckert.

Q. Where do you live? A. Palmer.

Q. Are you a member of the Matanuska Valley Farmers Cooperating Association?

A. Yes sir, I am.

Q. At the present time do you have any official capacity with that organization?

A. Yes, I am the acting manager at the present time.

Q. And do you have any other official position?

A. Well, I am also on the Board of Directors.

Q. How long have you been on the Board of Directors?

A. Well, I was on about a year in '43, I believe. Then I went Outside for a year and when I came back I was elected back on, in '45—I believe in the spring of '45.

Q. And have you been on the Board since the spring of '45?

(Testimony of Virgil Eckert.)

A. No, I beg your pardon. It was '46 when I came back on the Board.

Q. The second time, then, you have been on the Board about a year? A. That is right.

Q. Now, as acting manager of the co-op, are you in charge of the minutes of that organization? [347]

A. Well, as secretary of the Board, I am.

Q. As secretary of the Board of Directors?

A. Yes.

Q. Are you also secretary of the Board of Directors? A. Yes sir.

Q. Mr. Eckert, do you have the original minute books of the Matanuska Valley Farmers Cooperating Association there?

A. I have two of them here. There are four of them altogether.

Q. I wish you would look at the minutes for February 10, 1943. A. I have them here.

Q. All right, commencing where it says the meeting was again called to order at 8:30 p.m.—can you find that?

Mr. Grigsby: Excuse me. Is that the minutes of the Board of Directors?

Mr. Davis: That is the minutes of the Board of Directors. Mr. Eckert, am I correct in that? That is the minutes of the Board of Directors you have there? A. Yes, it is.

Q. Of the Matanuska Valley Farmers Cooperating Association?

A. " . . . meeting was again called to order at 8:30 p.m. . . ."—is that you——

(Testimony of Virgil Eckert.)

Q. Start there and read to the end of its discussion concerning—the end of the action concerning milk.

A. (Reading:) "In order to allow further discussion with dariymen on milk prices, a motion was made by Snodgrass, seconded by McAllister, that subject to confirmation at the next meeting, the following schedule of milk and cream prices be established, effective Dec. 1, 1942:"

Want me to read further? [348]

Q. The rest, yes.

A: "Grade A. Whole Milk: $5.10 per cwt for 4% milk with surplus butterfat at current landed cost of butter.

"Grade B Whole Milk: $3.75 per cwt for 4% milk with surplus butterfat at current landed cost of butter.

"Grade I sweet cream: 10c per pound over landed cost of butter.

"Grade 2 sour cream: landed cost of butter.

"Motion carried."

Q. Now, Mr. Eckert, did you cause to be prepared copies of those minutes—that particular minute you have just read?

A. I believe we did.

Q. Is that the copy that you had prepared (handing paper to witness.) A. Yes, it is.

Mr. Davis: Your Honor, I would like to ask that the action taken by the Board of Directors on February 10, 1943, which is——

(Testimony of Virgil Eckert.)

Mr. Grigsby: He said '42, didn't he there?

Mr. Davis: '43, I think—February 10, 1943.

A. Yes sir, that is right.

Mr. Davis: It is effective in December, 42, George. I want to offer it in evidence and I would like to submit the copy rather than the original book.

The Court: Is there objection?

Mr. Davis: I have a copy of it here for you, George, if you want it.

Mr. Grigsby: Very well. [349]

The Court: Without objection it may be admitted in evidence. The copy will be admitted in lieu of the original as Defendant's Exhibit No. 6.

(Defendant's Exhibit No. 6 admitted in evidence.)

DEFENDANT'S EXHIBIT NO. 6

Meeting Of The Board of Directors
Feb. 10, 1943

* * * The meeting was again called to order at 8:30 p.m. with the same Directors present.

In order to allow further discussion with dairymen on milk prices, a motion was made by Snodgrass, seconded by McAllister, that subject to confirmation at the next meeting, the following schedule of milk and cream prices be established, effective Dec. 1, 1942:

Grade A Whole Milk: $5.10 per cwt, for 4%

(Testimony of Virgil Eckert.)

milk with surplus butterfat at current landed cost of butter.

Grade B Whole Milk: $3.75 per cwt for 4% milk with surplus butterfat at current landed cost of butter.

Grade 1 sweet cream: 10c per pound over landed cost of butter.

Grade 2 sour cream: landed cost of butter.

Motion carried.

[Endorsed]: Filed August 5, 1948.

Mr. Davis: Now then, Mr. Eckert, turn to February 13, 1943. That is No. 6 that was admitted?

The Court: No. 6, yes.

Mr. Davis: Now then, Mr. Eckert, can you find motion by McAllister, seconded by Brix, that the new schedule of milk and cream payments be confirmed? A. Yes, I have it here.

Q. Will you read that, please, down to the end of anything pertaining to milk in that meeting?

A: "Motion by McAllister, seconded by Brix that the new schedule of milk and cream payments be confirmed. Motion carried."

"Motion by Brix, seconded by Snodgrass, that a monthly bonus of 25c per hundredweight of whole milk be paid to producers who, during any month between Dec. 1 and May 31 of each year, bring in

(Testimony of Virgil Eckert.)

80% or more of their monthly average for the remaining six months of the year. Motion carried."

Q. Now, is that all at that meeting that pertained to milk?

The Court: What is the date of that meeting?

Mr. Davis: February 13, 1943, your Honor—three days later than the first one.

The Witness: I believe that is all there is in there about milk.

Q. Now, you have been reading [350] from the minutes of the Board of Directors of the Matanuska Valley Farmers Cooperating Association for February 13, 1943? A. Yes sir.

Q. Is that correct? Now, will you likewise have copies prepared of those minutes?

A. Yes, I believe we did.

Q. Is this the copy that you caused to be prepare (handing witness paper).

A. Yes, that's right.

Mr. Davis: I would like to offer this, your Honor, as a copy in lieu of the original; and here is a copy for you (handing paper to Mr. Grigsby.)

The Court: If there is no objection it will be admitted and marked Defendant's Exhibit No. 7.

(Defendant's Exhibit No. 7 admitted in evidence.)

(Testimony of Virgil Eckert.)

DEFENDANT'S EXHIBIT NO. 7

Meeting of The Board of Directors
Feb. 13, 1943

* * * Motion by McAllister, second by Brix that the new schedule of milk and cream payments be confirmed. Motion carried.

Motion by Brix, seconded by Snodgrass, that a monthly bonus of 25c per hundredweight of whole milk be paid to producers who, during any month between Dec. 1 and May 31 of each year, bring in 80% or more of their monthly average for the remaining six months of the year. Motion carried.

[Endorsed]: Filed August 5, 1948.

Mr. Davis: Now then, Mr. Eckert, will you turn to the minutes of January 15, 1944?

A. Yes, I have them here.

Q. Will you find the place where it reads: "A motion was made by Linn seconded by LeDuc that it be the policy of the Association . . ."—you find that? A. Yes, I have it here.

Q. Will you read that motion, please?

A: "A motion was made by Linn seconded by LeDuc that it be the policy of the Association to distribute its earnings on the following basis:

"1. That the earnings of each department be distributed to the patrons in direct proportion

(Testimony of Virgil Eckert.)

to their patronage in that department, where ever it is possible and practical to do so.

"2. That the earnings of all departments not included in item number 1, together with the losses of any department be [351] alloted to the department included in the item number 1, on the basis of sales and distributed as part of the earnings of those departments.

"3. That earnings of casual sales be allotted in the same manner as earnings included in items number 2.

"Motion carried."

Q. Now, is that also taken from the official minutes of the Matanuska Valley Farmers Cooperating Association Board of Directors?

A. Yes, it is, of January 15, 1944.

Q. And did you cause copies to be made of that minute? A. Yes.

Q. Check that and see if that is the copy you caused to be made of that particular minute (handing paper to witness.) A. Yes, it is.

Mr. Davis: I would like to offer this, your Honor—copy as an exhibit in lieu of the original. (Handed a paper to Mr. Grigsby also.)

Mr. Grigsby: Just a minute before—we object to this last offer as immaterial—not related to the issues in the case.

The Court: Objection is overruled. It may be admitted and marked Defendant's Exhibit No. 8.

(Testimony of Virgil Eckert.)

(Defendant's Exhibit No. 8 admitted in evidence.)

DEFENDANT'S EXHIBIT NO. 8

Palmer, Alaska, January 15th, 1944

Minutes

* * * a Motion was made by Linn seconded by LeDuc that it be the policy of the association to distribute its earnings on the following basis:

1. That the earnings of each department be distributed to the patrons in direct proportion to their patronage in that department, where ever it is possible and practical to do so.
2. That the earnings of all departments not included in item number 1, together with the losses of any department be alloted to the department included in the item number 1, on the basis of sales and distributed as part of the earnings of those departments.
3. That earnings of casual sales be alloted in the same manner as earnings included in items number 2.

Motion carried.

[Endorsed]: Filed August 5, 1948.

(Testimony of Virgil Eckert.)

Mr. Davis: Will you turn now, Mr. Eckert, to the minutes for October 7, 1944—

Mr. Grigsby: We wish to also add to the objection—and not binding on the plaintiffs [352] in this action.

The Court: Objection is overruled.

The Witness: I have it here, Mr. Davis.

Mr. Davis: "Motion made by Hoffman seconded by Patten . . . " Can you find that?

A. Yes, I have that one here.

Q. Will you read that motion, please?

A: "Motion made by Hoffman seconded by Patten that Milk Bonus be increased to fifty cents per cwt and the time effective be September first to March first on both Grade A & B milk. Carried."

Q. And that is from the official minutes of the Board of Directors of the Matanuska Valley Farmers Cooperating Association?

A. Yes, sir, it is.

Q. For October 7, 1944?

A. That's right.

Q. Did you cause copies to be made of that minute? A. Yes sir.

Q. I will hand you this paper and ask if that is the copy you had prepared of that minute?

A. Yes sir, it is.

Mr. Davis: I would like to offer this paper, your Honor, as a copy in lieu of the original minute.

The Court: That may be admitted and marked Defendant's Exhibit No. 9.

(Defendant's Exhibit No. 9 admitted in evidence.)

(Testimony of Virgil Eckert.)

DEFENDANT'S EXHIBIT NO. 9

Palmer, Alaska
October 7, 1944

* * * Motion made by Hoffman seconded by Patten that Milk Bonus be increased to fifty cents per cwt and the time effective be September first to March first on both Grade A & B Milk. Carried.

[Endorsed]: Filed August 5, 1948.

Mr. Davis: Now, will your turn, please, to March 16, 1946—

Mr. Grigsby: Are you going to be much longer with this witness?

Mr. Davis: Yes, I expect to be sometime with this witness, [353] but I would like to finish this particular phase of it. I have two more proferred exhibits.

Mr. Grigsby: Couldn't it be done tomorrow morning?

Mr. Davis: I can't try this case tomorrow morning.

Mr. Grigsby: Very well.

The Witness: I have it here, Mr. Davis.

Mr. Davis: Can you find "Mr. C. R. Monaghan came in at this time"?

A. I don't see it in that particular minutes, Mr. Davis.

Q. What's that?

(Testimony of Virgil Eckert.)

A. I don't see it in that particular——

Q. March 16, 1946?

A. March? Oh, I have February 16. Yes, that is in the minutes here: both Mr. McAllister and Mr. Monaghan came in.

Q. Will you read what is in the minutes about that conference?

A. It says in here that Mr. McAllister came in at this time to discuss the members' marketing contract, calling special attention to Paragraph (7) and (8) of the contract. There was a long and serious discussion on this matter with many good ideas being brought out. Mr. C. R. Monaghan came in at this time also and asked that the price of milk not be lowered during the summer, stating that the financial report of the creamery justified that the price of milk stay the same as during the winter months.

Mr. Grigsby: What is the date of that, please?

Mr. Davis: March 16, 1946.

Read the next paragraph too, please. [354]

A. The President appointed a committee of four, Mr. Stock, Mr. Linn, Mr. McAllister and Mr. Harrington, to meet and work out and formulate a plan for a milk pool to be set up for the future. The committee was to meet March 20.

Q. Now, I notice that on the copy that has been prepared here, we didn't get in the part about Mr. McAllister. We started with Mr. Monaghan. I am going to reserve that for a future date to get that

(Testimony of Virgil Eckert.)

just the way the minutes read. Look at March 22, 1946, please? A. Yes, I have that here.

Q. A motion was made by Sherrod?

A. Yes sir.

Q. Read that, please?

A. "A motion was made by Sherrod seconded by Rebarcheck that such records as are necessary be maintained in Creamery and Dairy as to accurately reflect the effect of various operations within these units on the total years operations. Also, a milk pool be established as of December 1, 1945 for the fiscal year of 1946 on the following basis:

"(1) That the distributable overages be returned to the producers on the basis of the dollar value of products delivered to the association.

"(2) All distributable overages from the sale of milk and cream.

"(3) The overages from the sale of ice cream mix and cottage cheese, only in the percentage that milk is used."

All voted in the affirmative.

Q. There is another motion, I believe?

A. "A motion was made by Sherrod, seconded by Rebarcheck that the winter price paid for milk be continued on through April. Roll Call: All voted in the affirmative." [355]

Q. Now, that is the minute of the Matanuska

(Testimony of Virgil Eckert.)

Valley Farmers Cooperating Association Board of Directors for March 22, 1946? A. Yes, sir.

Q. Did you cause to be prepared a copy of that minute? A. Yes.

Q. Is that the copy which was prepared?

A. Yes, sir.

Mr. Davis: I would like to offer this copy, your Honor, in lieu of the original minute which has been read. (Handed a paper to Mr. Grigsby also.)

The Court: It may be admitted and marked Defendant's Exhibit 10.

(Defendant's Exhibit No. 10 admitted in evidence.

DEFENDANT'S EXHIBIT No. 10

Minutes—March 22, 1946
(Special)

* * * A motion was made by Sherrod, seconded by Rebarcheck, that such records as are necessary be maintained in Creamery and Dairy as to accurately reflect the effect of various operations within these units on the total years operations. Also a milk pool be established as of December 1, 1945, for the fiscal year of 1946 on the following basis:

(1) That the distributable overages be returned to the producers on the basis of the dollar value of products delivered to the association.

(2) All distributable overages from the sale of milk and cream.

(Testimony of Virgil Eckert.)

(3) The overages from the sale of ice cream mix and cottage cheese, only in the percentage the milk is used.

Roll call: All voted in the affirmative.

A motion was made by Sherrod, seconded by Rebarcheck, that the winter price paid for milk be continued on through April. Roll call: All voted in the affirmative.

[Endorsed]: Filed August 5, 1948.

Mr. Davis: Now, your Honor, it seems to be apparent we can't finish tonight. It is five minutes after four now. I would like to ask that the trial of this case be continued for a period of ten days. I intend to leave tomorrow for Seattle. I expect to be back in a week. But in order to cover any eventuality I would ask that it be postponed for a period of ten days.

Mr. Grigsby: If the Court please, I object to any continuance. The 1947 season is well under way, and the plaintiffs are anxious to have this case determined as soon as possible. I supposed it was set for trial with the understanding it would be finished.

Mr. Davis: Well, your Honor, I don't think I have been delaying the trial. I just got to my case 15 minutes ago. [356]

Mr. Grigsby: But you are about to ask for ten days' delay, which I object to. I don't see any reason.

(Testimony of Virgil Eckert.)

Mr. Davis: I previously let it be known I intended to ask for the delay before we went on at this time. I had hoped to get the evidence in today, but it seems apparent we can't.

Mr. Grigsby: How much longer will it take to get in your evidence when you get back?

Mr. Davis: I don't know.

Mr. Grigsby: Well, over a day?

Mr. Davis: I don't think so.

The Court: The trial will be continued until April 18 at 11 o'clock in the morning. April 18 is Friday and we may have some matter on the motion calendar to take up, and so we will take up this case at 11, and I earnestly hope that we will be able to conclude it then and that counsel, when the evidence is in, will be ready to argue the case. In the meantime, if counsel have any judicial opinions or decisions that the Court ought to know about I would like to have you submit lists as soon as possible.

Mr. Davis: At the time we adjourned last time, I mentioned I had two books on co-op law. I intended to leave them for your Honor, but I did not. Do you wish them at this time?

The Court: You may leave them either at my office or in the library and I will get them. They will be available to Mr. Grigsby, too, if he wishes. [357]

Mr. Grigsby: Your Honor, also it seems to me important and it should be within the power of the defendant—it isn't in our power—to produce the figures showing the creamery profits, if any, of 1945?

(Testimony of Virgil Eckert.)

The Court: Well, the Court will now instruct the defendant to produce those figures if they are available. I realize that the figures may be available only as the result of the expenditure of very considerable sums of money in a re-audit of all the books. That being the case, I would not expect to have the books re-audited to secure the figures which counsel for plaintiff has mentioned.

Mr. Davis: Well, insofar as possible, your Honor, we will furnish a true, accurate breakdown of the profits of the creamery and the dairy for the year 1945.

The Court: Very well, perhaps that will be sufficient. Is there anything else? You may step down, Mr. Eckert. I think that counsel do not care to proceed any further at this time.

Mr. Grigsby: No, your Honor. We can't make enough headway to justify the delay.

The Court: Very well, trial will be continued as stated heretofore.

(Whereupon adjournment was had at 4:10 o'clock p.m.)

(On Tuesday, July 15, 1947, the following further proceedings were had:)

The Court: This is the time set for the continuance of the [358] trial of the case of C. R. Monaghan vs. the Matanuska Valley Farmers Cooperating Association, No. A-4252.

Mr. Davis: Your Honor, before proceeding, at the time we met last, Mr. Grigsby asked that cer-

tain figures from the original records be furnished to him. It has developed that it has been impossible to dig out those figures. The defendants have brought down the original records in question and they are here in the court room available for examination by Mr. Grigsby or anybody that he may wish to have examine them.

Now, at the time we suspended, I believe Mr. Eckert was on the stand. Am I right?

The Clerk: Yes.

Mr. Davis: So far as I am concerned, I am done with Mr. Eckert, subject to cross-examination by Mr. Grigsby.

The Court: Mr. Eckert may resume the stand.

Mr. Grigsby: No cross.

Mr. Davis: At this time, then, I would like to call Mr. Allyn.

MARVIN ALLYN

heretofore duly sworn, resumed the witness stand and testified for and in behalf of the defendant as follows:

Direct Examination

By Mr. Davis:

Q. Mr. Allyn, at the time you were testifying for Mr. Grigsby some testimony was put in concerning the relationship [359] between the business done by the so-called Creamery Department and the business done by the so-called Dairy Department of the co-op, and at one time you gave the Court one

(Testimony of Marvin Allyn.)

figure on that relationship and at another time you gave him another figure, and the Court asked you to clear up the discrepancy between those two figures. Will you go ahead at this time, now, and tell the Court—clear up that discrepancy if you can?

A. The first figure inadvertently was a preliminary calculation which I made during the first two weeks of my—in the Valley. Further examination required a revision of those figures. Subsequent to the last session of the court, when I had the opportunity to review this material again, it was called to my attention that the year 1944 and 1945 are not applicable and the arbitrary method used in 1944 could not be applied to 1945 because of the fact that you had no eggs handled through the department in '44, and eggs were a considerable part of your business in 1945. So, an arbitrary system wouldn't apply to the two years.

Q. Now, Mr. Allyn, are the two years, 1944 and 1945, then, comparable in the breakdown between the Creamery Department and the Dairy Department? Can they be compared from the figures that are available? A. No, they can not.

Q. And what, then, about this testimony you gave us? Is it valid testimony as to the breakdown between the two, or should that be disregarded?

A. From my standpoint, it should be disregarded. [360]

Q. Is there any way you have been able to work out a relationship between the creamery and the dairy from the year 1945?

(Testimony of Marvin Allyn.)

A. It has not been possible.

The Court: Between what?

The Witness: '44 and '45.

Mr. Davis: The relationship, your Honor, between the creamery and the dairy for '44 and '45—the proportionate parts of the two. Mr. Allyn, as I remember it, gave testimony that he thought he could project the creamery did such and such proportion of the total business and the dairy did such and such proportion of the total business for 1945, based on a computation which had been made in 1944. Later in another session he gave another figure and your Honor asked him what was the discrepancy between those two figures. As I understand it, his testimony now is that neither figure should have any effect—that it is just impossible to figure out any such relationship. Mr. Allyn, can you give us the figure of the money paid to egg producers for the year 1945?

A. Approximately 34,700.

Q. And would that item, 34,700, be part of the item, costs of goods sold under the dairy-creamery department? A. It would.

Mr. Davis: That's all, Mr. Allyn.

The Court: Just a minute. Mr. Grigsby may have some questions.

Cross-Examination

By Mr. Grigsby:

Q. And did you find out what your profiit was on those eggs [361] that you paid $34,700 for?

(Testimony of Marvin Allyn.)

A. No.

Q. Then you can't find that out? A. No.

Mr. Grigsby: No cross.

Mr. Davis: I have one further question, your Honor, that I should have asked him.

The Court: Go ahead.

Direct Examination

By Mr. Davis:

Q. I think that this has been covered, but this case has been handled over so long a time it is hard to tell. Mr. Allyn, I think it is already in the testimony that the amount paid the farmers is kept——

The Court: Will you start over again? I missed one or two words.

Mr. Davis: I said, I think it is in evidence that the amount paid to the farmers for eggs and for milk and other items is kept separate. Is that right? A. That's correct.

Q. But that the amount of income—the amount of revenue—is not kept separate for the various items? A. That is correct.

Q. In other words, the Dairy Department receives so much gross revenue, but you don't know what the revenue came from?

A. That's right.

Q. Whether eggs, ice cream, milk or whatever it might have been? A. That is right.

Mr. Davis: That is all. [362]

(Testimony of Marvin Allyn.)

Cross-Examination

By Mr. Grigsby:

Q. Are those eggs all sold as fresh eggs—those eggs that you paid $34,700 for in the year in question, 1945? Were they sold as fresh eggs on the market? A. As far as I know.

Mr. Grigsby: That's all.

Mr. Davis: That's all.

The Court: Another witness may be called.

Mr. Grigsby: Just one other question, Mr. Allyn: These books that Mr. Davis mentioned, you have been unable to dig out from the books after an effort the percentage of earnings of the creamery as compared with that of the milk sold by the dairymen? Is that what you stated?

A. That's right.

Q. And what is in these books that an examination can reveal? What can I find out from examining those books? Can I find out from those books what you made on the creamery? A. No.

Q. You have just offered me the books?

A. That's right.

Q. To show that I can't find out anything from them?

A. To show that you can search through all of those invoices, one by one, and find out the questions you were asking on how much was paid for powdered milk.

Q. Or any of the other—rest of the information I want? A. No.

(Testimony of Marvin Allyn.)

Q. I can't find it?

A. You cannot find out what labor is applicable to eggs or to the various products. Your overhead [363] expenses you cannot apply to the various products.

Mr. Grigsby: That's all.

Mr. Davis: That's all. I would like to call Mr. Stock.

L. C. STOCK

being first duly sworn, testified for and in behalf of the defendant as follows:

Direct Examination

By Mr. Davis:

Q. Mr. Stock, will you state your name, please?

A. L. C. Stock.

Q. Where do you live? A. In Palmer.

Q. How long have you lived in Pamer?

A. Since March, 1939.

Q. And, beginning in 1939, did you have an official position with the Matanuska Valley Farmers Cooperating Association??

A. Yes, sir, I was general manager from that date until November 30, 1943.

Q. What date in 1943? A. November 30.

The Court: When did you first take over the office?

The Witness: In March, 1939; I believe it was the 17th of March when I arrived there.

(Testimony of L. C. Stock.)

The Court: Served until November 30, 1943?

A. Yes, sir.

The Court: Very well.

Mr. Davis: Since you left the co-op as general manager, Mr. Stock, have you at various times had other official capacities in the co-op?

A. Yes, sir. I was a member of the Board [364] of Directors for a short period in '45, and then I went intobusiness and resigned and then was re-elected again the next year and served for a year and a half then as a member of the Board.

Q. Now, at the time that the trial was being held before, you were a member of the Board, is that correct?

A. Yes, sir, I was President of the Board at that time.

Q. And you are not a member of the Board now? A. No, sir.

Q. When did you go out of office, Mr. Stock?

A. About six weeks ago, I believe.

Q. Roughly, about the first of June?

A. Yes.

Q. In 1947? A. Yes.

Q. Now, Mr. Stock, then, from 1939 until the present time have you been pretty close in touch with the affairs of the Matanuska Valley Farmers Cooperating Association? A. Yes, sir.

Q. And during that time have you observed the workings of the co-op and the purchase of milk by the co-op and all that sort of thing?

(Testimony of L. C. Stock.)

A. Yes, sir. I set up that procedure.

Q. Will you start at the beginning, Mr. Stock, back in 1939 at the time you were first general manager and bring down to the present time the way that milk purchases have been handled by that co-op, to your knowledge?

A. When I first arrive din Palmer in '39, the cooperative had no function other than an advisory capacity, and they had transferred their entire authority to the Alaska Rural Rehabilitation Administration through a marketing or management contract. After several months' work on the part [365] of myself and the Board of Directors at that time, we requested of the Corporation that they turn over the operation of the three units known as the Creamery, Produce and Meat Departments, which were all running heavily in the red and which contributed to the incomes of the farmers. That was done, and on the creamery we immediately set up—started to obtain new markets for dairy products. The only commodity being purchased at the time that the units were turned over to the cooperative was sour cream. If I remember correctly, we classified as dairymen approximately 75 or 80 people who were living in the Valley, and we called anyone a dairyman who delivered any sour cream, regardless of the amount, to the creamery, and some of it came in there in as small amounts as two or three pounds at a time. The farmers were paid, if I remember correctly, 33c a pound for that butterfat. We developed the cottage

(Testimony of L. C. Stock.)

cheese and the buttermilk markets, started the manufacture of ice cream and then purchased the dairy in Anchorage—Peterkin Dairy—and equipment and their stock, and started to retail fluid milk in the Anchorage market. Our first increase that had any reflection to the farmers, we started to buy sweet cream at 60c a pound. When we went into the fluid milk market we purchased the milk on a butterfat basis for a dollar a pound. It was necessary to have additional outlets down here because we did not get the plant of the Peterkin Dairy, so we constructed the present Anchorage Dairy plant and building for that purpose from the Association funds, and attempted to tap each [366] market that presented itself that could reflect back to the farmer, either in his original payment or in additional earnings at the end of the year more money for the dairy products.

If I remember correctly, after we had started into this fluid milk business, we quit the purchase of sour cream because all of the farmers who had sufficient cows at all went into the milk business or into the sweet cream business for the use in ice cream and discontinued the manufacture of butter.

In our payments we attempted to—in the early days, when we were first getting started, while I had had considerable experience in the milk industry Outside, I had had none in Alaska and conditions were different, and together with the Board of Directors and the best advice we could get we attempted to set the price of milk as close to the top

(Testimony of L. C. Stock.)

as we possibly could and still leave a margin of safety for operation, and in each year when the profits, or the business of the Association, had been determined, to advance that price to the farmer and still maintain that margin of safety in the operations. And in addition to that, any overages that were indicated as applicable to that particular department, if the Association as a whole made a profit, that unit shared in that profit in proportion to the amount of earnings which the profit and loss indicated was due them.

Q. Mr. Stock, when you left the managership of the co-op did you go into business for yourself?

A. Yes, sir. [367]

Q. What business did you go into?

A. Restaurant business and farming.

Q. And as a farmer, did you deal with the co-op? A. Yes, sir.

Q. And are you one of the milk producers?

A. No, sir. I sell eggs, potatoes and vegetables.

Q. Now, you are familiar with the people who have been on the Board of Directors over the last several years, are you not? A. Yes, sir.

Q. Will you tell the Court approximately the number of members of the cooperating association —Matanuska Valley Farmers Cooperating Association—in the year in question, 1945?

A. As I recall it, there was approximately 130 members.

Q. Are those all active members, Mr. Stock, or

(Testimony of L. C. Stock.)

are there some of those members that wouldn't be doing any business with the co-op?

A. Well, I would say they are all members who had sold some agricultural product to the Association during the previous year.

Q. Then you would call them to some extent active members? A. Yes.

Q. Can you give the Court an approximation of how many dairymen there were the previous year, people who sold milk to the co-op?

A. I think there were 20 or 21 Grade A men and seven or eight Grade B men.

Q. Now, Mr. Stock, have the dairymen been represented on the Board of Directors of this co-op since, say, 1942?

A. I don't [368] recall any instance in which the dairymen were not in a majority on the Board at all times.

Q. During all the time since, say, 1942?

A. Yes.

Q. Now, Mr. Stock, is there anything else that you can add to clarify to the Court some of these matters that I haven't asked you about?

A. Only in the set-up there we have a unique organization. In most cooperatives they are organized for one particular purpose, either to sell milk, to sell beans, to retail merchandise or to handle one commodity—eggs or butterfat or milk or whatever it might be. The very nature of the installation up there—they have various activities and, of course, they must be intermingled. It was set up

(Testimony of L. C. Stock.)

originally with federal funds and then became the cooperative, making it possible for them to take over by borrowing federal funds. It immediately became an obligation upon all the Association, and when this question was first presented to the Board, of which I was a member, our attitude was that there was $2800 to distribute and we knew of no legal or any other obligation that would permit us to segregate one unit away from the other and distribute as overages anything other than the profits indicated by the Association as a whole. It was our belief, and we have been taught—I have been taught, in my business life—that it is not proper to distribute earnings out of anything except earnings. It cannot come out of capital, and that was my reason for my decision and the answer that I gave the boys at that time. While [369] I sympathized with them, it was one of those things I could see no out on. If any other policy had been followed the Association would have been broke a long time ago.

Q. Mr. Stock, you weren't present up there at the time that this corporation—this Association—was first organized, were you? A. No, sir.

Q. In the matter of your duties as general manager did you go into the matter of the original formation of this matter and the subsequent amendment of the Articles and all that sort of thing?

A. Yes, sir.

Q. Will you tell the Court something about that—the relationship between this organization and

(Testimony of L. C. Stock.)

the so-called Corporation—the ARRC—and all that sort of thing?

A. Well, the Alaska Rural Rehabilitation Corporation was the agency——

Mr. Grigsby: We object to it as immaterial, if the Court please.

The Court: I do not see the pertinency of it, Mr. Davis.

Mr. Davis: The thing I am trying to bring out, your Honor, is the fact that this agreement here actually was made up by the ARRC, or some other agency, back about 1936. Many of these parties actually signed it way back when they first moved up to the Valley. Since that time the cooperative association has changed back—I think this was in '37—they changed their setup and later took over the facilities that the ARRC had. And I thought it might be helpful to the Court to go into that for [370] the record.

The Court: Objection is overruled. You may inquire.

Mr. Davis: I don't know. Possibly your Honor already has judicial notice of what took place there. I don't know. I don't want to encumber the record.

The Court: Well, I suppose there has been some general reference to it during the trial of the case. I do not see that it has any direct bearing, at least, upon the question which is now being presented.

Mr. Davis: Well, if it hasn't let's not get into it. That is all, Mr. Stock.

(Testimony of L. C. Stock.)

The Court: Counsel for plaintiff may examine.

Cross-Examination

By Mr. Grigsby:

Q. What, Mr. Stock, is your business now?

A. I beg your pardon?

Q. What is your business down there now?

A. I am part owner of a restaurant and developing a farm.

Q. What? A. Developing a farm.

Q. Well, are you growing some products?

A. Yes, sir.

Q. Did you sell any last year?

A. Yes, sir.

Q. To any substantial amount?

A. Not any great amount because I didn't move on my farm until June last year.

Q. What was that?

A. Not any great amount because I didn't move on my farm until June last year. [371]

The Court: Will you speak a bit louder, Mr. Stock, so that counsel can hear you?

Mr. Grigsby: I didn't get your answer.

The Witness: I say, I didn't sell a great amount last year because I didn't move on my farm until June.

Q. Well, you are a member of this Association defendant? A. Yes, sir.

Q. And you have a contract with the co-op down there to run this restaurant? A. Yes, sir.

(Testimony of L. C. Stock.)

Q. You ran it last year? A. Yes, sir.

Q. How many years have you run it?

A. I didn't hear you.

Q. Huh? A. I didn't understand.

Q. How many years have you had that business?

A. About two years.

Q. And you have made a profit both years?

A. Profit on what, the restaurant?

Q. Sir? A. Profit on the restaurant?

Q. Yes.

A. Yes, we have made some profit on the restaurant.

Q. Now, Mr. Stock, are you familiar with these books, that are in evidence here—the 1945, '44?

A. No, sir, only in a general way.

Mr. Grigsby: That's all.

The Court: That is all. Have you any further questions?

Mr. Davis: No further questions.

The Court: That is all, Mr. Stock. [372]

Mr. Davis: Excuse me, your Honor, for about two or three minutes?

The Court: Yes. Court will stand in recess until 11:25.

(Whereupon recess was had at 11:18 o'clock a.m.)

After Recess

The Court: Another witness may be called.

Mr. Davis: Defendant rests, your Honor.

Mr. Grigsby: Your Honor, before the defendant rests, may I ask Mr. Allyn another question?

The Court: Mr. Allyn, will you kindly take the witness stand again?

MARVIN ALLYN

heretofore duly sworn, again resumed the stand and further testified for and in behalf of the defendant as follows:

Cross-Examination

By Mr. Grigsby:

Q. Mr. Allyn, I think you stated for the year in controversy here that you paid $34,700 for eggs?

A. I believe that's correct.

Q. And you paid approximately $136,000 for milk? A. I believe that's correct.

Q. That would make a total—$136,000 and $34,700—of $170,700. Now, the total cost of all creamery and dairy products, according to Plaintiff's Exhibit 3, was $178,422.88, remember that?

A. Yes.

Q. So that approximately $8,000 went into other articles [373] used in the creamery, such as powdered milk and whatever you bought from the outside, is that right?

A. You would also have an inventory adjustment to consider.

Q. Well, I am talking about this charge here. There is $178,422.88 total cost of goods sold to the co-op by the dairy-creamery unit, and of that $136,000 was paid to milk producers and $34,700 to egg producers, leaving a balance of some 7,000 and some hundred dollars paid for other?

(Testimony of Marvin Allyn.)

A. That's right.

Q. Goods that went into the creamery-dairy? That would be correct, wouldn't it?

A. (Witness nodded.)

Q. Now, as a matter of fact, you lost money on eggs in 1945, didn't you? A. I don't know.

Q. Didn't you so state to Mr. McAllister and Mr. Monaghan, in discussing this matter, last spring, and that you wished you were rid of the egg business—that it was a loser?

A. I have no recollection of such a statement.

Q. At a dairy meeting this spring in Palmer? You made no such statement?

A. I made the statement that the egg producers were not carrying their share of the indirect overhead——

Q. What would their share of the indirect overhead be?

A. ——in 1947. I made no comment on eggs. I had no information.

Q. Well, what is the indirect overhead per dollar of—it is based on the amount of goods sold, isn't it? A. It varies, from year to year.

Q. Yes, and it is apportioned according to the amount of [374] business done?

A. That is right.

Q. But it averages 12½c a dollar, doesn't it?

A. It was approximately that figure in 1946.

Q. And in 1945 also?

A. It would be indicated in your audit report. I don't recall the figure.

(Testimony of Marvin Allyn.)

Q. All right now, don't your books show—you know what the mark-up on eggs was that you sold to the market?

A. The year in question I do not.

Q. Your books don't show it? A. No.

Q. It was 15c, wasn't it?

A. I don't know.

Q. Well, didn't you so state to Mr. McAllister and Mr. Monaghan at that dairy meeting?

A. I never discussed eggs in 1945.

Q. You haven't the slightest idea?

A. I have not.

Q. Well, do those books show what your mark-up was on eggs? A. They do not.

Q. Do you know anybody that knows?

A. Mr. Snodgrass could probably give you an estimate of that.

Q. Did you buy eggs by the dozen?

A. That's correct.

Q. Know what you paid for them?

A. I do not in 1945.

Q. Mr. Snodgrass——

A. You buy eggs by grade.

Q. Is Mr. Snodgrass here? A. He is.

Mr. Grigsby: That's all.

The Court: Wait a minute. Any further examination, Mr. Davis?

Mr. Davis: No further. [375]

The Court: That is all, Mr. Allyn.

Mr. Grigsby: May I call Mr. McAllister?

The Court: Have you any further testimony, Mr. Davis?

Mr. Davis: The defendant rests, your Honor.

The Court: Very well, rebuttal testimony may be heard.

Mr. Grigsby: Mr. McAllister.

The Court: Mr. McAllister may take the stand.

FRANK McALLISTER

heretofore duly sworn, resumed the stand and further testified for and in behalf of the plaintiff as follows:

Direct Examination

By Mr. Grigsby:

Q. Mr. McAllister, do you recall a conversation you had with Mr. Allyn at a dairyman's meeting last spring down at Palmer?

A. Well, it wasn't exactly that last spring. I believe it was about two months ago at a dairy meeting.

Q. Well, in that conversation did he make any statement with reference to the loss or profit on eggs in 1945? A. He did.

Q. Did he?

A. Yes, he—I asked him a question, the way it came about, on the price of milk and it was shown here by about—Mr. Snodgrass showed here on the bulletin board, or on the blackboard, that the indirect overhead was 12½c on the dollar. And I know that the mark-up at that time was 15c on a

(Testimony of Frank McAllister.)

dozen eggs. And they run a test on approximately how much it would cost to handle—that is, to candle the eggs, the cartons and to case [376] them and the labor and all the direct overhead. The man that made the test run told me that it was 8¾c on a dozen.

Q. Now, did they always tell you what the mark-up was?

A. The mark-up—I sold a few eggs in that time and I know the mark-up was 15c a dozen. I questioned Mr. Allyn at that meeting and I asked him if it wasn't so that 12½c was the indirect overhead, and I asked him if it wasn't so that 8¾c was the direct overhead, and that would make 21¾c, and the only mark-up was 15c—so I asked if we didn't lose 6½c on each dozen.

Q. What did he say? A. He said "yes."

Q. Did he say he wished he could get out of the egg business?

A. He said something about, we should do something about the egg business. The reason it come up: I asked him why they didn't make egg producers stand their share of the losses, that is, there is no use selling eggs at a loss all the time, and even at the present time—well, it is the same condition—still losing money on each dozen.

Mr. Grigsby: That's all.

The Court: Counsel for the defendant may examine.

Mr. Davis: No questions.

(Testimony of Frank McAllister.)

The Court: That is all, Mr. McAllister. Any further rebuttal testimony?

Mr. Grigsby: If the Court please, I believe Mr. Davis agreed if I could get the assignment of one of the claimants—a Harold Thuma—who did not have his assignment when I put in [377] my case——

Mr. Davis: Fact of the matter is, we haven't any of the assignments.

Mr. Grigsby: Well, he has sworn to all of them except Thuma. Yes, we proved, your Honor, that he had assignments from all these claimants and left it with me and I was unable to find it—except Harold Thuma. Mr. Davis agreed with me that if I procured Mr. Thuma's assignment I could have it introduced in evidence.

The Court: Do you offer that in evidence?

Mr. Grigsby: Yes, your Honor.

The Court: It may be admitted and appropriately marked. That is an assignment from whom?

Mr. Grigsby: Assignment of his claim to the plaintiff—Harold Thuma.

The Court: What will be the number of it?

The Clerk: 18.

The Court: Plaintiff's Exhibit 18, assignment of Harold Thuma.

(Plaintiff's Exhibit No. 18 admitted in evidence.)

(Testimony of Frank McAllister.)

PLAINTIFF'S EXHIBIT No. 18

Assignment

Palmer, Alaska
April 24, 1947

For Value Received, I hereby assign to C. R. Monaghan my claim against the Matanuska Valley Farmers' Co-operative Association, amounting to $551.86.

/s/HAROLD L. THUMA.

[Endorsed]: Filed August 5, 1948.

The Court: Any further rebuttal testimony?

Mr. Grigsby: We rest.

Mr. Davis: I would like to call Mr. Eckert, your Honor.

The Court: Mr. Eckert may be called.

VIRGIL ECKERT

heretofore duly sworn, resumed the stand and further testified [378] for and in behalf of the defendant as follows:

Direct Examination

By Mr. Davis:

Q. Mr. Eckert, you have already been sworn——

A. Yes, sir.

Q. — and stated your name. Were you present, Mr. Eckert, at this dairymen's meeting Mr. McAllister just testified about?

(Testimony of Virgil Eckert.)

A. Yes, I believe I was.

Q. And did you hear the conversation between Mr. McAllister and Mr. Allyn?

A. Yes, I remember some discussion.

Q. Do you know—did you hear the statements made by Mr. Allyn? A. Yes, I did.

Q. What year was he talking about when he was talking about eggs?

A. It was my understanding he was talking about 1947.

Q. Did you hear any conversation about 1945, as to eggs? A. No, I didn't.

Mr. Davis: That's all.

Cross Examination

By Mr. Grigsby:

Q. Well, are you a member of the Association?

A. Yes, sir.

Q. Sir? A. Yes, sir.

Q. And do you know—what is paid the farmers for eggs now?

A. I believe they are paid 90c a dozen for large eggs.

Q. How much?

A. 90c a dozen for large eggs.

Q. I can't hear.

A. 90c a dozen for large eggs.

Q. And what were they paying in '45?

A. I am sure I don't [379] remember.

Q. They were paying more than 90, weren't they?

(Testimony of Virgil Eckert.)

A. Well, I couldn't say for sure. I think probably they were.

Q. And Mr. Eckert says they are losing money on eggs that they are paying 90c for, didn't he? He was talking about '47—Mr. Allyn? I will withdraw the question. You just testified that the conversation that was detailed by Mr. McAllister referred to the year 1947?

A. Well, I am sure that Mr. Allyn was talking about 1947.

Q. The conversation in which they said they were losing money on eggs? A. Yes, sir.

Q. And you were paying 90c for eggs in 1947?

A. That's right.

Q. And you paid a dollar or more in 1945?

A. That could be possible.

Mr. Grigsby: That's all.

Redirect Examination

By Mr. Davis:

Q. Mr. Eckert, was the conversation that they were losing money on eggs in 1947 or was it that the eggs weren't bearing their proportionate share of the indirect overhead?

Mr. Grigsby: Objected to as leading.

The Witness: It would probably amount to the same thing.

The Court: Overruled.

The Witness: They were shipping the cartons outside by air, [380] I believe, and the cost of candling—they wouldn't bear their share of the expense.

(Testimony of Virgil Eckert.)

Mr. Davis: That is all.

Mr. Grigsby: That is all.

The Court: Any further surrebuttal?

Mr. Davis: We rest, your Honor.

Mr. Grigsby: We rest.

The Court: Counsel wish a recess before proceeding to arguments or shall we take it up this afternoon?

Mr. Grigsby: I suggest, your Honor, it has been so long since we had the major portion of this evidence in and we have had so little time since our return to go over these details, and there are some parts of the transcript that it will be necessary for me to get, and I think our arguments should be presented in writing—anyway, a brief of arguments. As far as I am concerned I will stipulate that this be submitted on a written statement.

Mr. Davis: I will stipulate, your Honor.

The Court: That is quite agreeable to the Court and I hope that counsel will take the trouble to give a very full and complete statement of both the facts and the law. How much time do you wish?

Mr. Grigsby: I think I can have my statement ready in ten days.

The Court: Mr. Davis, you will require ten days, too? [381]

Mr. Davis: Yes, your Honor, at least. The fact of the matter is, if Mr. Grigsby is going to want to get parts of the testimony, it is going to probably take longer than ten days to get that, your Honor.

The Court: Well, we do not want to prolong it indefinitely. Suppose we give plaintiff 15 days to file opening brief, and defendant 15 days to file reply brief, and the plaintiff may have ten days to answer the defendant's argument and brief.

Mr. Grigsby: The first limitation was how much?

The Court: 15 days, I thought—15 apiece and then 10 for the final brief. I do not know that 10 will be necessary, but you may as well make it 10 for the reply brief and argument. A minute order may be made accordingly.

I hope you can get everything in so I shall be able to give the case the attention it deserves and arrive at a decision before jury trials are resumed in September.

* * *

On Friday, November 21, 1947, in open court at Anchorage, the Court delivered the following oral opinion in the cause:

In the case of C. R. Monaghan, Plaintiff, v. the Matanuska Valley Farmers Cooperating Association, Defendant, No. A-4252, which was tried at intervals over a considerable period of time and in which counsel have prepared and filed exhaustive briefs, the decision must go for the plaintiff and against the defendant upon the contract which was entered into between the parties and [392] which I believe all of the parties clearly understood to mean what is contended by the plaintiff in this action.

Some question there was about the principle of estoppel, although not argued and not pleaded, be-

cause this is a cooperating association and the plaintiffs and their associates, of course, were represented on the Board of Directors. But I find there are no circumstances here which would estop the plaintiffs from asserting their claims. The contract, while perhaps not the wisest one that could have been made for the benefit of all parties, is at least more than reasonably explicit and it must be followed out. No matter what any judge may think of it as to whether there should have been a different contract, it is the duty of the Court in my judgment to enforce it as written.

Now, the question is as to the amount. The defendant has denied all liability, but the contract itself provides that the defendant has the right to deduct—reading, now, from Sec. (7), Subsection (e):

> "Two per centum * * * of the gross sales price received for the products of said member sold separately or of the amounts representing said member's interest in products sold wherein his products are pooled or comingled with others as funds belonging to the Association to meet its indebtedness and additional expenses, contribute to the Association's reserves (with which to acquire ownership of industries and enterprises and property in connection therewith and for other proper purposes), to pay interest on capital stock by way of dividends and for other proper purposes as provided for by the laws of Alaska pertaining to 'Cooperative Associations' under which the Association has

been incorporated and by the By-laws of the Association." [383]

No entry was made on the books, apparently, of this deduction and I am of the opinion that the plaintiffs cannot justly claim the amount that might have been deducted and ought to have been deducted and would have been deducted if some other system of bookkeeping had been set up, and since the defendant has disclaimed all liability—all responsibility—I think it is the duty of the Court to make that deduction on the theory the greater includes the less.

Now, the question arises as to how the deduction should be made because the books kept were relatively primitive in form and made no separate account, apparently, of the amounts received for milk itself and for other things made out of milk such as ice cream and some articles called "popcicles," the nature of which I do not know at the present moment. And, therefore, in calculating the 2 per cent on the gross amount of sales—gross sales price—it is necessary to take an arbitrary figure. That figure is arrived at by taking the total sales as shown by the books of the corporation, $361,145.56, and deducting therefrom, not the sales price of ice cream and similar products, because we do not know what it was, but the cost of everything that went into the materials that resulted in a gross sales price of $361,145.56. That amount—and this includes the cost of eggs and powdered milk and flavoring and other things—is $42,279.41. That was finally arrived at and we know the details of it be-

cause it was revealed by the evidence on the last day of the trial, as I recall. We find [384] that $34,700, approximately, was paid for eggs; $7,579.41 was paid for powdered milk and other materials. In any event, deducting this amount which was not paid out for milk, $42,279.41, from the gross receipts of the dairy-creamery operation, we have left $318,866.15. Two per cent of that is $6,377.32.

Now, the net profits of the dairy-creamery operation, as shown by the books of the defendant, not including rentals, was $53,793.83. In my judgment rentals have no place in this part of the business at all and, therefore, the rentals have been ignored, although on the books the rentals were carried as a part of the profits of the dairy-creamery operation, which would have brought the total up to more than $57,000. But taking the net profits of $53,793.83 from the dairy-creamery operation, as shown by the defendant's books, and deducting therefrom 2 per cent of the amount which I have noted, would leave $47,416.51.

Now, the plaintiffs in this action, of course, do not represent all of those who furnished milk to the defendant, and there is some question, owing to the nature of the defendant's books, as to what proportion the plaintiffs do represent, but I have taken for guidance one of the defendant's exhibits here—Defendant's Exhibit No. 3—and this indicates that the plaintiffs received $82,417.68 out of a total of $136,143.47 paid for milk. Other figures are shown in plaintiff's exhibits—in Plaintiff's Exhibit No. 2 the amount is different—and in the de-

fendant's brief the amount is set out as $84,867.90—that [385] appears on Page 11 of the defendant's brief. But it seems to me that the figure of $82,-417.68 is probably the correct one. At any rate, it has the strongest support in the evidence. Dividing that figure by the total amount paid for milk, $136,-143.47, gives as a result that the plaintiffs represent 60.53 per cent of the total amount or value of milk sold to the defendant in the fiscal year 1945.

And so, to go back now to the figure that we arrived at as $47,416.51 as the net profits after making the 2 per cent deduction, and multiplying that by 60.53 per cent, we arrive at a figure of $28,700.60 as the total amount of plaintiff's recovery. I have not calculated how much is due to each individual plaintiff. That can be determined by plaintiffs or plaintiffs' counsel and inserted in the Findings and the Judgment that may be prepared.

Findings and Judgment may be prepared accordingly.

I have not overlooked the contention of the defendant so clearly set forth in his brief that a large part of the profits of the dairy-creamery operation came from something other than milk, but I think under all of the evidence that the conclusion arrived at in the brief, although sustained by detailed figures, is absolutely impossible because we find from the testimony that except for milk the only purchases made were $34,700 for eggs and $7,579.41 for some other materials, including powdered milk, and there was positive testimony, undenied and undisputed, that the [386] eggs were sold at a loss. Now,

if that were not the fact I think that somebody representing the defendant could have shown otherwise. In fact, it must have been common knowledge to those in the office of the defendant as to whether the sale of the eggs was or was not profitable. Mr. McAllister testified that there was a loss on every dozen of eggs sold and, therefore, that leaves only purchases of $7,579.41 out of which the plaintiff could possibly have made 42 per cent of the profits as claimed by the defendant in his brief. It just does not work out and, therefore, although there may have been some slight profit in something else than milk, nobody in the world upon this state of the evidence can decipher what it is and in any event it is insignificant. And, therefore, the plaintiffs are entitled to recover the amount mentioned.

I am much obliged to counsel for the care and attention they have given to the matter and for the detailed and illuminating nature of their briefs. They covered the whole subject so that it made the work much easier than it would have been had it been necessary for me to go over the evidence item by item and line for line and determine just what the facts are and how they are related to each other. [387]

* * *

REPORTER'S CERTIFICATE

United States of America,
Territory of Alaska—ss.

I, Ruth Haley, Official Court Reporter of the above entitled court, hereby certify:

That the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause, taken by me in shorthand in open court at Anchorage, Alaska, on March 13 and 14, April 7 and 8, July 15 and November 21, 1947, and thereafter transcribed by me. The original and one carbon copy have been delivered to Davis and Renfrew, attorneys for the defendant.

/s/ RUTH HALEY.

That thereupon and on the 29th day of December, 1947, the Court entered its Findings of Fact and Conclusions of Law in the matter and on the same day rendered its Judgment that the plaintiff have and recover from the defendant the sum of $28,700.60, with interest at the rate of 6 per cent per annum from the first day of July, 1946, amounting to the sum of $2,544.74, with interest at the rate of 6 per cent per annum, on the total sum of $31,245.34, from the date of the judgment, and allowing the plaintiff costs and disbursements from the defendant in the amount of $357.00 and that such judgment was entered by the Court on the 29th day of December, 1947.

For as much as the matters and things above set forth, including reporter's transcript of proceed-

ings and oral opinion of Judge in the matter and exhibits introduced at the trial, by the respective parties, do not fully appear of record the said defendant, Matanuska Valley Farmers Cooperating Association, tenders and presents the foregoing reporter's transcript of proceedings, including oral opinion of the judge, and exhibits of the respective parties as its Bill of Exceptions in such cause, and prays that the same may be settled, filed, signed and sealed and made a part of the record in said cause by this Court pursuant to law in such cases.

Dated at Anchorage, Third Division, Territory of Alaska, this 5th day of August, 1948.

DAVIS & RENFREW,
Attorneys for the Defendant,

By /s/ EDWARD V. DAVIS.

Receipt is hereby acknowledged of copy of Bill of Exceptions on appeal in the above-entitled action on this 5th day of August, 1948.

/s/ GEORGE B. GRIGSBY,
Attorneys for Plaintiff.

[Endorsed]: Filed August 5, 1948.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, M. E. S. Brunelle, Clerk of the above-entitled Court, do hereby certify that pursuant to the provisions of Rule 11 (1) of the United States Court of Appeals for the Ninth Circuit, as amended, and pursuant to the provisions of Rules 75 (g) (o) of the Federal Rules of Civil Procedure, and pursuant to designation of counsel, I am transmitting herewith the original papers in my office dealing with the above-entitled action or proceeding, and including specifically the complete record and file of such action, including the bill of exceptions setting forth all the testimony taken at the trial of the cause, and all of the exhibits introduced by the respective parties, such record being the complete record of the cause pursuant to the said designation.

The papers herewith transmitted constitute the record on appeal from the judgment filed and entered in the above-entitled cause by the above-entitled Court on December 29, 1947 to the United States Court of Appeals at San Francisco, California.

[Seal]: /s/ M. E. S. BRUNELLE,
Clerk of the District Court for the Territory of Alaska, Third Division.

[Endorsed]: No. 12544. United States Court of Appeals for the Ninth Circuit. Matanuska Valley Farmers Cooperating Association, a Corporation, Appellant, vs. C. R. Monaghan, Appellee. Transcript of Record. Appeal from the District Court for the Territory of Alaska, Third Division.

Filed May 11, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals for the Ninth Circuit

No. 12544

MATANUSKA VALLEY FARMERS COOPERATING ASSOCIATION,

Appellant,

vs.

C. R. MONAGHAN,

Appellee.

APPELLANT'S DESIGNATION OF POINTS HE INTENDS TO RELY ON APPEAL

Comes now appellant and pursuant to Rule 19 of the above-entitled court, sets forth the points on which appellant intends to rely on this appeal, namely:

1. The plaintiffs prior to their instituting the action below, had been paid for the milk sold and delivered by them to the Association and thereafter

were entitled only to their proportionate share of any net earnings which the Association might have available for distribution; since there were no such net earnings for the year 1945 (covered by plaintiffs' action) they were not entitled to any further payment.

2. The payment by the Association of any further sum to the plaintiffs would constitute a dividend paid from the capital assets, rather than from the earnings, of the Association, and would be at variation with (a) the Articles and By-laws of the Association, and (b) the marketing contract between plaintiffs and the Association.

3. The payment of such a dividend would be contrary to the statutes of Alaska, particularly Alaska Compiled Laws Annotated (1949), Sec. 36-3-8.

4. The practise of the Association and of its members, including plaintiffs, in all prior years was to make any such further payment only from the net earnings, if any, of the Association; such practise constitutes a further, and independent basis for disallowing any further payments to plaintiffs for the year 1945.

Respectfully submitted,

/s/ EDWARD V. DAVIS,
Of Davis & Renfrew.

/s/ JACK S. CLUCK,
Of Houghton, Cluck, Coughlin & Henry, Attorneys for Appellant.

[Endorsed]: Filed May 13, 1950.

[Title of District Court and Cause.]

STIPULATION CONCERNING PRINTING OF RECORD

It is hereby stipulated and agreed by and between Davis & Renfrew, attorneys for the Appellant, and George B. Grigsby, attorney for the Appellee, that the entire record in the above matter as submitted to the Court of Appeals by the District Court shall be printed, except those certain portions hereinafter particularly set forth, which are not material to the determination of the questions raised by the appeal in this matter, and may be omitted from the printed record by the Clerk of the above-entitled Court, as follows:

1) The printed papers marked "Judgment Roll."

2) Minute Order dated February 15, 1947, setting the cause of trial.

3) Praecipe for subpoenas for various witnesses on behalf of the defendant.

4) Order dated March 29, 1947, allowing the withdrawal by plaintiff's attorney of plaintiff's Exhibits Numbers II, III, and IV, and defendant's Exhibits I and IV in the above-entitled cause.

5) A letter from the Matanuska Valley Farmers Cooperating Association, defendant - appellant, signed by Mr. Allyn, directed to the District Judge.

6) Motion and Order concerning withdrawal of Exhibits by the plaintiff and receipt for such Exhibits by the plaintiff.

7) Brief and Argument of the plaintiff, filed August 14, 1947.

8) Order dated August 20, 1947, allowing withdrawal of Exhibits by defendant, together with receipt for such Exhibits dated the same date.

9) Argument on behalf of the defendant.

10) Reply Brief and Argument of the plaintiff filed November 18, 1947.

11) Order for withdrawal of the Exhibits by plaintiff dated December 13, 1947, together with receipt for such Exhibits dated December 16, 1947.

12) Cost bill filed 1-2-48.

13) Execution dated January 14, 1948, filed March 8, 1948.

14) Notice of Levy of Execution.

15) Transcript of Oral Opinion.

This transcript is included in the bill of exceptions and should not be printed twice.

16) Motion for Extension of Time to Docket Appeal dated June 8, 1948, together with affidavit in support thereof. The Order allowing the extension should be printed.

17) Minute Order dated July 28, 1948, allowing withdrawal of files and exhibits.

18) Order filed March 9, 1950, allowing appellant's attorney to withdraw the bill of exceptions.

19) Exhibit "A" attached to plaintiff's complaint and plaintiff's Exhibit I, both being printed copies of Standard Marketing Agreement, should not both be printed, and the Clerk is authorized to omit printing either Exhibit I or Exhibit "A," as the case may be, making reference to the omission.

20) Page 2 of plaintiff's Exhibit Number VI is a duplication of Page I of such exhibit and may be omitted from the printing of the record.

Dated at Anchorage, Alaska, this 13th day of May, 1950.

DAVIS & RENFREW,

Box 477, Anchorage, Alaska. Attorneys for defendant-appellant.

By /s/ EDWARD V. DAVIS.

GEORGE B. GRIGSBY,

Anchorage, Alaska. Attorney for plaintiff-appellee.

By /s/ GEORGE B. GRIGSBY.

[Endorsed]: Filed May 17, 1950.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated and Agreed by and between Davis & Renfrew, attorneys for the appellant, and George B. Grigsby, attorney for the appellee, for and on behalf of their respective clients, and subject to the approval of the above-entitled Court, that plaintiff's Exhibit I, being a printed copy of a

marketing agreement, and plaintiff's Exhibit VI, being an audit report for fiscal year ending November 30, 1945, and defendant's Exhibit I, being an audit report for fiscal year ending November 30, 1944, and defendant's Exhibit II, being a printed copy of Articles of Incorporation and By-Laws of the defendant association, need not be printed, but may be considered by the Court of Appeals in their original form. All other exhibits introduced by the respective parties are to be printed as a part of the printed record.

Dated at Anchorage, Alaska, this 5th day of June, 1950.

DAVIS & RENFREW,

Box 477, Anchorage, Alaska. Attorneys for the Appellant.

By /s/ EDWARD V. DAVIS.

/s/ GEORGE B. GRIGSBY,
Attorney for the Appellee.

So Ordered:

/s/ WILLIAM SIMMONS,
Chief Clerk.

/s/ CLIFTON MATTHEWS,

/s/ WM. E. ORR,
United States Circuit Judges.

[Endorsed]: Filed June 8, 1950.

NO. 12544

In The United States Court of Appeals
For the Ninth Circuit

MATANUSKA VALLEY FARMERS COOPERATING ASSOCIATION, a Corporation, *Appellant,*

vs.

C. R. MONAGHAN, *Appellee.*

APPEAL FROM THE DISTRICT COURT,
TERRITORY OF ALASKA,
THIRD DIVISION

BRIEF OF APPELLANT

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535 Central Building,
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THE ARGUS PRESS, SEATTLE

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In The United States Court of Appeals
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vs.

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THE ARGUS PRESS, SEATTLE

INDEX

TABLE OF CASES

TEXTBOOKS

STATUTES

In The United States Court of Appeals

For the Ninth Circuit

MATANUSKA VALLEY FARMERS COOPERATING ASSOCIATION, a Corporation, *Appellant,* vs. C. R. MONAGHAN, *Appellee.*	No. 12544

APPEAL FROM THE DISTRICT COURT,
TERRITORY OF ALASKA,
THIRD DIVISION

BRIEF OF APPELLANT

I.

STATEMENT RELATING TO PLEADINGS AND JURISDICTION

This is an appeal from a judgment against appellant (hereinafter called the Association) rendered by the District Court for the Territory of Alaska, Third Division. The judgment was for $28,700.60 and costs (R. 129-130).

Jurisdiction of the District Court is conferred by Title 48 U.S.C.A. Sec. 101 and 2 Alaska Compiled Laws Ann., 1949, Title 53, Sec. 53-1-1. Jurisdiction of this court to review the judgment of the District Court is conferred by New Title 28 U.S.C.A. Sec. 1291. By the terms of Title 48 U.S.C.A. Sec. 103a the Federal Rules of Civil Procedure were made applicable to the Territory of Alaska as of July 18, 1949.

The following facts were pleaded by the appellee, as

plaintiff below, in his complaint (R. 2-4) and admitted by the Association in its Answer (R. 73-75): The Association is a corporation organized under the laws of Alaska engaged in the business of buying, selling, handling and processing agricultural products on a cooperative basis; the business is done at or near Palmer, Alaska, with its stockholder-members (R. 2, 73). The plaintiff is a stockholder-member of the Association and during the period December 1, 1944, ending November 30, 1945, he was engaged in the dairy business near Palmer. During this period, and prior thereto, he sold a stated quantity of milk to the Association under the terms of a written contract with it (R. 3, 73). A copy of the contract, called "Member's Standard Marketing Contract," is attached to plaintiff's complaint as Exhibit A (R. 58-73). The Association commingled plaintiff's milk with that sold to it by other dairymen-stockholders and then resold such milk and products made by it therefrom (R. 3-75).

In twenty succeeding causes of action the plaintiff alleged the assignment of each to him, and essentially the same facts with reference to each assignor as those set forth above (R. 4-58). Aside from denying such assignment upon information and belief, which was proved at the trial (R. 169-174), the defendant made corresponding admissions of these facts (R. 76-109).

In its Answer the Association alleged, as to each cause of action, that it purchased and paid for all milk delivered at a fixed price, which varied from time to time during the year (R. 74-109).

At the conclusion of the trial the court rendered an

oral opinion (R. 590-595). It then entered Findings of Fact which follow closely the admitted facts as set forth above (R. 122-128) and the Conclusion of Law that plaintiff was entitled to recover in the sum above mentioned (R. 128).

II.

STATEMENT OF THE CASE

When stated accurately, the facts emerge as being virtually uncontroverted. The Association is incorporated as a "co-operative business corporation" under Title 26, Chapter 3, Alaska Compiled Laws (1949) Sec. 36-3-1 and following. Its Articles and By-Laws are in evidence (Defendant's Exhibit 2, R. 302, 149).

The Member's Standard Marketing Contract referred to above, is a form contract in use by the Association and its shareholders since 1937, and prior thereto (R. 168). It was executed not only with dairymen but also with the other producers and growers of agricultural products selling them to the Association (R. 377).

The Association is almost unique in structure and method of operation. The Alaska Rural Rehabilitation Corporation and other agencies of the United States had established a group of enterprises near Palmer, as a kind of civic center, to serve both growers and consumers (R. 572, 358). This was in furtherance of a policy to foster the development of agriculture in the Matanuska Valley by citizens of the United States. These operations had shown a heavy loss. The Co-operative was notified that unless it acquired them they

would be closed down (R. 356). After a trial period, in which the Association acquired and operated three "departments" only, it acquired all of them in January, 1940, borrowing from the United States $300,000.00 to cover the purchase price (R. 357).

The Association operated, or continued to operate, the enterprises thus acquired in rather loosely defined "departments." First, there are the "consumer departments." These are defined as the Warehouse, Trading Post (retail store), Garage, or any unit in which the Association buys from some source other than the farmers for resale to the farmers as consumers (R. 363-364). Then there are the "producer departments," consisting of "Produce" and "Dairy Creamery" and any unit in which products are procured from farmers for resale (R. 363-364).

The Association soon put the operations as a whole on a profit-making basis. It even refunded to the Government monies advanced by it ($7,000 per month) to defray heavy losses anticipated on the basis of prior experience (R. 357-358).

However, each year thereafter some departments showed a profit while others showed a loss. In 1940 when the properties were acquired the "creamery" department was among those showing a heavy loss (R. 572), while others showed a profit (R. 376). At that time the dairymen were marketing their product in the form of sour cream (R. 572). Shortly afterwards the Association constructed a dairy-creamery plant at Anchorage, established retail routes for direct-to-consumer sales, and engaged in the processing and manufacture

of dairy products (R. 572-574). Dairymen thereafter marketed their product to the Association in the form of milk instead of sour cream, at considerably higher prices (R. 573). From 1941 on the dairy-creamery department consistently showed a profit, which was large in comparison with that of other departments.

As to the dairymen, the practice for years was for the Association to make a payment on the 5th and 20th of each month as to milk delivered during the preceding two weeks. The dairymen received slips whenever they delivered milk showing the poundage delivered, the butterfat test, the price of the milk and the amount of money to be paid therefor on the succeeding bi-monthly payment date (R. 437). The Association made payments regularly to each dairyman in accordance with a price per hundred pounds of milk delivered, fixed from time to time by its Board of Directors. The prices paid by the Association from 1941 through 1946 are set forth in Defendant's Exhibit 4 (R. 306).

The procedure for determining the amount of any annual payment or credit to the shareholders was described in detail (R. 352-354, 361-365, 374-376, 453-456, 465-575, 573, 575-576). In brief it was as follows: In the Spring of each year, the Association caused an audit to be made of its books, covering the preceding fiscal year. The audit showed the profit, if any, made by the Association and that credited to each department. The Association then pro-rated its profit to those departments, and those only which showed a profit, in proportion that the profit of each bore to the total profit of the Association. At the same time, it pro-rated the sum

credited to each profit-making department to the individual producers and consumers patronizing it in proportion of their patronage, i.e., the dollar volume of purchases by consumers and the dollar volume of sales by producers. It paid the producers this sum in cash, but gave consumers 10-year notes or "certificates of equity," utilizing the cash covered thereby as its sole reserve to pay off its note to the Government.

In the Spring of 1946 the audit of the Association for the preceding fiscal year, involved in this suit, showed that the Association had a profit of only $2,889.27 (R. 181-182) without allowance for any payment on its note to the government. If a reserve had been set up for that purpose, a deduction of $6,000 from that figure would be necessary, putting the Association in the red for the year 1945 (R. 359). This compared with an Association profit of about $60,000 for the preceding year 1944 (R. 352).

The profit shown for the creamery-dairy department for 1945 was $57,001.85 (R. 181-182) with two other departments showing smaller profits, others showing losses (R. 300). The plaintiff and his assignors demanded payment of the proportion of the full $57,001.85 in ratio to their sales. This demand was refused on the ground that compliance therewith would involve an illegal depletion of the corporation's capital, and as being contrary to the member's contract (R. 576). Plaintiff then brought suit.

III.
QUESTION INVOLVED

The question presented by this appeal is: were the shareholders of the Association who sold milk to it and received bi-monthly payments therefor during the fiscal year 1945 (December 1, 1944, to November 30, 1945) entitled to the profit shown on its books for the creamery-dairy department ($57,001.85) even though the Association for that year showed a profit of only $2,800 for all departments even without provision for any annual reserve ($6,000.00) necessary to pay its note to the United States?

IV.
SPECIFICATIONS OF ERROR

1. The District Court erred as to its Finding of Fact Number V, particularly that portion thereof to the effect that the defendants promised to pay for the milk delivered under paragraphs (6) and (7) of the contract, and that by reason of the premises there became due and owing to the plaintiff and his assignors from defendant on the 1st day of July, 1946, after deduction of the items stated in paragraph (7) of said contract, the aggregate sum of $28,700.60, no part of which has been paid (R. 126-127).

2. The District Court erred as to its Conclusion of Law, that the plaintiff is entitled to recover in the sum above mentioned (R. 128).

3. The District Court erred in making and entering its Judgment for the payment of the sum above mentioned (R. 129-130).

Since these Specifications of Error all relate to the same question of law, we shall discuss them together.

V.

ARGUMENT

It will be noticed that the District Court made no finding of fact whatsoever beyond the facts alleged by plaintiff in his complaint and admitted by the Association in its answer. It is true that the court's Finding of Fact V favored one of the plaintiff's contentions, that the milk was sold by plaintiff and his assignors under paragraph (7) of the contract, rather than under other provisions of the contract as defendant contended. However, this is in substance a conclusion of law, not one of fact.

Furthermore, it is emphasized that the essential facts in this case, as contrasted with conclusions drawn from facts, will be found to be virtually uncontroverted when all the evidence is reviewed.

The case thus comes up to this court presenting essentially questions of law. Therefore, no principle favoring determinations made by a trial court upon disputed facts serves as any barrier to an adjudication of the issues presented herein upon their merits. Furthermore, this court has held expressly that it exercises its independent judgment in any appeal from a Judgment of the District Court for the Territory of Alaska.

> *Carscadden v. Territory of Alaska* (C.C.A. 9, 1939) 105 F. (2d) 377, 383.

The argument to be presented herein may be summarized as follows, consistent with the headings to be adopted:

1. When all provisions of the contract are reviewed

together and related to their underlying purpose it is evident that appellee's interpretation would completely defeat their purpose. The contract was executed with all producers who sold varied agricultural products to the Association. The purpose was to further a broad business venture on a non-profit, self-supporting basis, by which all shareholders could market their products on favorable terms and likewise purchase needed supplies and commodities of various kinds. Appellee would defeat this purpose by draining off the profit from all profit-making departments each year, leaving the Association with annual losses only.

2. The interpretation of the contract under long-established practice of the parties is to be given great, if not controlling consideration. This would be so either as effecting a modification of a written contract made many years ago (prior to 1937), or as embodying rules and regulations subsequently adopted to which each producer in paragraph (1) of the contract agreed to be bound. At the least, the practice would have great weight as reflecting the interpretation placed upon the contract by the parties themselves.

3. The practice of the parties, since the inception of their operations in 1940 was for the Association to distribute or credit any net profit of the Association as a whole back to those departments which showed a profit for the year, as a basis of allocating it to the individual shareholders who sold products to, or purchased them from the Association, a profit-making department. The dairymen during the entire period had a majority on the Association's board, and controlled

the procedure. They were satisfied with it and implicitly recognized its justice. Their complaint in 1946 arose as to the preceding year because it happened that the Association had no profit to distribute for the year 1945, or at most about $2,800.

4. Paragraph (7) of the Contract, providing for the payment of products pooled pursuant to paragraph (6), on the basis of resale price received less stated deductions, does not apply. The milk was not pooled in accordance with paragraph (6) because this paragraph contemplates an identifiable pool of like products by grade whereas the milk was commingled with many other unlike products regardless of grade. If the dairymen had deemed paragraphs (6) and (7) applicable they would have demanded an accounting and remittance at the end of each bi-monthly period, when all milk for the preceding two weeks normally was resold. To avoid the connotation of "price," appellee attempted to classify the regular bi-monthly payments to producers for milk delivered as "advances" made in the discretion of the Association. In substance they were not, for several reasons stated.

5. However, even if paragraph (7) were held to govern, the position of the appellant still would be well taken because the deductions therein authorized must be construed by reference to long-established practice. The plaintiff misapplied the concept of "indirect overhead" under the practice of the parties; this had been used as a rule-of-thumb to assist in the break-down of Association profit to the profit-making departments and does not constitute any basis for draining off the

profit credited on the books to a particular department in a year when the Association as a whole made no profit.

6. The practice of the parties demonstrates that they did their business in accordance with paragraph (8), authorizing the Association to pay a flat delivery price as to products processed or manufactured into changed or new products. In substance the bi-monthly payments were the price paid from time to time for milk delivered pursuant to terms of cash sales thereof, and the payment when made to cover the year's business was a dividend proportioned upon sales. The Association processed or manufactured the milk within the meaning of paragraph (8) and did so at its own expense and as its own product.

7. The payment of the amount demanded by plaintiff would constitute an illegal payment of dividends out of capital rather than out of net profits, contrary to the common law, the statute under which the Association was incorporated, and its Articles and By-laws.

1.

Provisions of Contract Summarized; Appellee's Interpretation Would Completely Defeat Their Purpose.

The provisions of the Member's Standard Marketing Contract may be summarized rather briefly. In the opening recital it is stated that the contract is between the "Matanuska Valley Farmers Cooperative Association" and the "Producer" (R. 58). The word "Cooperative" had been changed to "Cooperating" in the Association's name in 1937 but the contract form had

been printed prior to that date and the correction not made to correspond (R. 168). It is recited that the Matanuska Valley Colonization Project had been established as a rural community with Government aid "for the public purpose of assisting the Territory of Alaska in some of its rural rehabilitation problems and making it possible for worthy and qualified persons to acquire for themselves and families suitable tracts of land in Alaska on small long-time payments not procurable through ordinary commercial channels." * * * (R. 58-59). It is further recited that the Association had been chartered by the Territory of Alaska under the sponsorship of the Alaska Rural Rehabilitation Corporation "in order to assist in carrying said policies and purposes forward for the public welfare and for the benefit of those living in the area * * *," and that the Alaska Rehabilitation Corporation had executed a separate contract with the Association to lend it financial assistance "and act as its Management and Sales Agency" (R. 59). Here, again, the evidence shows that the Association, shortly after acquiring properties in 1940, rejected the financial aid proffered (R. 358) and eliminated the use of the Alaska Rehabilitation Corporation as its management and sales agency (R. 361).

In paragraph (1) the Producer agrees to subscribe for a share of stock for $5.00 and to be bound by the by-laws, rules and regulations of the Association (R. 60).

In paragraph (2) the Association agrees to buy, and the Producer agrees to sell to the Association all agricultural products produced or raised by or for him or

acquired by him, except those reserved for farm or other personal use, and to deliver them in marketable condition to the Association (R. 60).

Paragraph (3) indicates the varied nature of the agricultural products for the marketing of which the contract was drawn. In this paragraph it is agreed "That the term 'agricultural products' as used herein includes horticultural, viticultural, forestry, dairy, poultry, bee and farm and ranch products and also includes such livestock raised for the market as the Association accepts for resale" (R. 61).

Paragraph (4) provides for advances to the producer in the discretion of the Association (R. 61-62).

In Paragraph (5) the Association agrees to market and resell the agricultural products delivered, performing processing and other services in connection therewith, and to pay therefor "as set forth in this Contract" (R. 62).

In Paragraph (6) the Producer agrees that the Association may establish "pools by grades" of any products delivered, and commingle them "with other like products delivered by others" and remit the net average price received therefor after making deductions authorized in the contract (R. 62).

In Paragraph (7) the Association agrees to pay to the Producer the amount received for the resale of such products after making deductions for the repayment of advances, reasonable charges for its services in receiving, handling and selling the agricultural products, operating and maintenance expenses, one dollar per year

for its official publication, and two per cent of the gross sales price received for capital and other purposes mentioned (R. 63).

By the terms of Paragraph (8) the Association is authorized "to process or manufacture into changed or new products" any products delivered and either pay therefor as provided in the preceding Paragraph (7) "or at its discretion to pay a flat delivery price therefor to the Producer as full payment thereof, to process or manufacture the product at its own expense and retain the full proceeds thereof" (R. 64).

Paragraph (9) provides for grading and kindred operations (R. 64).

Paragraph (10) authorizes the Association to borrow moneys and pledge products "as the absolute owner thereof" (R. 64-65).

Paragraphs (11), (12) and (14) relate to consumer purchases by shareholders. Under (11) the Producer agrees to purchase exclusively from the Association (R. 65) and under (12) the Association agrees to return to the Producer from the retail price received from him for all cash purchases a semi-annual patronage dividend, determined after making deductions therein listed (R. 65-66). Under Paragraph (14) the Association makes clear its policy to sell products to shareholders on a cash rather than a credit basis (R. 66-67).

The remaining paragraphs contain provisions as to remedies of the Association and other matters similar to those usually found in a co-operative marketing contract (R. 66-71). Paragraph (19) provides that the con-

tract shall remain in effect "continuously hereafter, subject to legal limitations, if any" and cannot be amended except by two-thirds of all members of the Association at an annual meeting or at a special meeting called upon 15 days' notice, under procedure therein set forth (R. 69-70).

Now, in a case of this kind there is scarcely any principle more fundamental than that all provisions of such a contract are to be construed together to effectuate its purpose.

United States v. Lewis et al. (D.C., N.D. Calif. 1939) 29 F. Supp. 512;

12 Am. Jur., "Contracts," 772-776, Sec. 241.

The Member's Standard Marketing Contract, it must be kept in mind, was executed by the Association with all shareholders who produced and sold their varied products to it, whether they were dairymen or other producers (R. 377).

It is evident that the purpose of the contract was to further a rather broad business venture on a non-profit but self-supporting basis, in which all the shareholders could market varied products on favorable terms and likewise purchase needed supplies and commodities of various kinds.

We would lose sight of the forest for the trees if we did not recognize at the outset that the interpretation placed upon the contract by the appellee would completely defeat this purpose. Appellee would have the Association pay all profit credited to a particular department in a given year even though the Association as

a whole incurred a heavy loss. This would convert the marketing contract into a mutual suicide pact. The cooperative regularly made a profit in some departments and suffered losses in others from the start of its business. It is clear that if the Association had followed Appellee's interpretation it would have failed long ago (R. 376).

At the trial below, the only answer to this point suggested by plaintiff's counsel was: "Well, but that doesn't alter the fact that you were buying that milk under a contract as set forth in Paragraph (7)" (R. 376). Such an answer disregards the fact that there are many more paragraphs in the contract than the one numbered (7) and emphasizes the need of considering the long-established practice of the parties, also.

2.

The Interpretation of the Contract Under Long-Established Practice of the Parties Is to Be Given Great, if Not Controlling Consideration.

It is a significant fact in this case that the contract before us was a printed form put in use by the Association and its producer-shareholders many years ago, prior to 1937 (R. 168). It would be unusual if it were not necessary occasionally to refer to the body of practice built up by the parties since then in determining what their rights might be. This long-established practice might be significant in one of several ways:

(1) It could even prevail over the plain terms of the contract, as showing a modification made by the parties since its execution.

Texas Cotton Co-operative Ass'n. v. Lennox
(1923) 113 Tex. 273, 37 S.W.(2d) 331, 336.

At least two provisions of the contract have been assumed by plaintiff to have been modified through practice. One was Paragraph (12), requiring semi-annual payment of patronage dividends on purchases made by shareholders from the Association (R. 65-66). The undisputed evidence is, that no such dividends had been paid at all. Instead, the Association issued ten-year notes or "certificates of equity" to the purchaser-shareholders entitled thereto, in lieu of cash (R. 363-364). Another provision modified was paragraph (7) (e) (R. 63), providing for a deduction of "2% of the gross sales price for the products of said member sold" for purposes therein referred to. At the same time that plaintiff urged that this paragraph be applied literally and rigidly in other respects, his own witnesses testified that whenever a 2% deduction was made, it was upon the price paid to the producer, not upon the "gross sales price"; 2% of the gross sales price would have been a substantially greater deduction (R. 202-203).

(2) It could prevail as embodying "rules, regulations and directions from time to time prescribed by the Association or its duly authorized officers and agencies covering production, marketing and sale of agricultural products * * * and other co-operative activities," referred to in Paragraph (1) of the contract, to which the producer agreed to be bound. The provision that a producer shall be bound by future, as well as

by present, rules, regulations or directions, is a valid one:

> *Watertown Milk Producers Co-operative Ass'n. v. Van Camp Packing Co., et al.* (1929) 129 Wis. 379, 226 N.W. 378, 379.

Action with respect to annual distribution of Association profit was regularly taken by motion of the shareholders and board of directors as we have noted. Such would come within the meaning of "rules, regulations and directions" under Paragraph (1) of the contract.

(3) At the least, it would be a very important, if not a controlling, factor in interpreting the contract:

> *Holbrook v. Petrol Corporation* (C.C.A. 9, 1940) 111 F.(2d) 967;
>
> *District of Columbia v. Gallaher,* 124 U.S. 505, 31 L. ed. 526;
>
> *Loomis Fruit Growers Ass'n. v. California Fruit Exchange* (1932) 128 Cal. App. 265, 16 P.(2d) 1040;
>
> *Boyle v. Pasco Growers Ass'n.* (1932) 170 Wash. 516, 17 P. (2d) 6;
>
> *Carlyle v. Majewski* (1933) 174 Wash. 687, 26 P.(2d) 79;
>
> 12 Am. Jur. "Contracts," pp. 787-790, Sec. 249.

The United States Supreme Court in *District of Columbia v. Gallaher,* 124 U.S. 505, *supra,* stated:

> "We think that the practical construction which the parties put upon the terms of their own contract, and according to which the work was done,

must prevail over the literal meaning of the contract, according to which the defendant seeks to obtain a deduction in the contract price."

In *Holbrook v. Petrol Corporation,* 111 F.(2d) 967, *supra,* this court quoted with approval the following language from the United States Supreme Court in *Brooklyn Life Insurance Co. v. Dutcher,* 95 U.S. 269, 273, 24 L.ed. 410:

> "There is no surer way to find out what parties meant, than to see what they have done. Self-interest stimulates the mind to activity, and sharpens its perspicacity. Parties in such cases often claim more, but rarely less, than they are entitled to. The probabilities are largely in the direction of the former. In considering the question before us, it is difficult to resist the cogency of this uniform practice during the period mentioned, as a factor in the case."

3.

The Long-Established Procedure, Controlled by the Dairymen, Was for the Association to Distribute or Credit Any Profit It Made Back to Those Shareholders Who Sold Products to or Purchased Them from the Association in Profit-Making Departments.

The point cannot be emphasized too strongly that the starting point for making any annual payment or credit to shareholders who sold products to or purchased them from the Association, was its annual net profit. The practice in this respect had been started when the Co-operative acquired its properties in 1940 (R. 572-574). The profit or loss shown on the Association's books for each of its several departments was

significant only in allocating the Association's profit to each of the Departments to which a profit was credited. This in turn was an intermediate step in computing the amount which the individual shareholders were to be paid or credited who sold products to, or purchased them from, the Association in any profit-making department.

The procedure involved was described by three persons familiar with it, all three having been called as witnesses by plaintiff. Mr. L. C. Stock outlined the general procedure briefly (R. 573-576). He had served at different times as president, manager and board member, and had played a leading part in establishing it when the Association commenced its operations (R. 570-572). Mr. Snodgrass gave a clear and complete explanation of it (R. 352-354, 361-365, 374-376, 453-456, 472-476). He had served as a director from 1941 through November, 1944 (R. 335) and as manager from January, 1944, until February, 1946 (R. 345). Mr. Marvin Allyn supplied details (R. 249-253); he had been chief accountant and assistant general manager of the Association (R. 248).

The procedure was as follows: Each Spring the Association employed an outside firm of public accountants to make an audit of its books for the preceding fiscal year, i.e., December 1 through November 30 of the preceding calendar year. The auditor set forth the actual profit or loss of the Association, and also computed the profit to be credited to each department. He had a record of sales as to each, and a record of "direct overheads" such as salaries of persons employed therein.

However, he had no standard based upon factual data for allocating "indirect overheads" so he applied a deduction of 12.494% of its gross sales therefor as to all departments.

The audit was presented to and approved by the shareholders at their annual meeting. Then the Board allocated all or a substantial part of the profit of the Association to each of the departments, and those only, which showed a profit for the preceding fiscal year. This allocation was made in the proportion that the profit of each department bore to the profit of the Association as a whole (R. 374).

As we have seen, the Association did not pay any money to shareholders who patronized the "consumer departments," instead, it gave them 10-year "certificates of equity," or notes, in an amount as to each proportioned upon his dollar purchases from the department (R. 362). The cash reserve created thereby was the only means provided for by the Association to pay its indebtedness to the government.

The Association made payments to producers in cash (R. 362). Each producer who had sold agricultural products in a profit-making department would receive his share of the Association's profit allocated thereto in proportion that his dollar sales bore to the dollar sales of other producers to it (R. 351-352).

Counsel for appellee may be challenged to point out any place in the record where any witness with direct knowledge of the Association's accounting or practice testified otherwise than in accordance with the forego-

ing. There are statements made by certain witnesses to the effect that it was the entire profit of each profit-making department that was distributed. On the face of things, this would not be possible because the Association had no way of making up for the losses in other departments (R. 376). Furthermore, each of the witnesses who made any such statement will be found to lack knowledge of what occurred. Thus the plaintiff himself admitted that he had no knowledge of how the amount he sued for had been calculated (R. 236-237), even though he testified that regular reports had been given at annual shareholder meetings as to the method of arriving at any annual payment (R. 239-240). Other witnesses stated that although they had access to the Association's books at any time they never had looked into the matter (R. 176, 413).

Now, it should be kept in mind that throughout this period, it was the *dairymen* who were in control of the Association's Board, and in charge of making or crediting Association profits to producers and consumers. Of the seven members on the Board, at least four were dairymen and sometimes there were five (R. 491, 575). During the Association's profit-making years 1941 through 1944 they were satisfied (R. 194). It was not until the audit made in 1946 disclosed that there was at most only about $2,800 profit for the entire Association for the fiscal year 1945, that this controversy arose.

The plaintiff-dairymen then wanted the full $57,001.58 credited to their department, and took the position that it was little short of outrageous that the large share of this sum should be applied to "subsidize" de-

partments which showed a loss. Yet this is precisely what the Association had done since it was chartered. The fact that it had authority in its Articles itself is a significant answer to plaintff's complaint, because losses in certain departments must have been contemplated from the start;

> *Washington Co-operative Egg & Poultry Ass'n. v. Taylor* (1922) 122 Wash. 466, 210 Pac. 785.

Other facts must be kept in mind on this subject. It was the Association as a whole which had financed the acquisition of the rather extensive dairy-creamery plant and facilities, not the dairymen alone (R. 327). Prior to this acquisition, the dairy-creamery department itself had been a losing one, and it undoubtedly was the extensive program undertaken by the Association to improve it that converted it into a profit-making one (R. 473). Too, the dairymen regularly patronized the losing departments and presumably derived benefits from them through patronage (R. 323-325, 327-332). They also benefited through distribution of the general overhead; the dairy-creamery department would lose a large part if not all of the profit credited to it if it were operated alone (R. 482).

4.

Paragraph (7) of the Contract Does Not Determine the Question Presented by This Appeal.

The plaintiff contended, and the court below took the view, that the question presented by this appeal is governed by paragraph (7) of the contract (R. 590-595).

We submit that this is incorrect. However, we shall urge, under heading 5 hereof, that even if this paragraph were held to apply, this court still should rule for Appellant because the deductions therein authorized, under the practice of the parties, covered allowance for obligations of the Association including maintenance of departments which suffered a loss. Under heading 6 hereof we shall submit what is believed to be the sounder view, that the practice of the parties, taken in connection with paragraph (8) indicates that the Association was purchasing the milk for cash and declaring a dividend in proportion to sales when a net profit was available therefor.

It is well to set forth the related paragraphs (6), (7) and (8) of the contract together:

> "(6) Producer agrees that the Association may establish or cause to be established through its Management and Sales Agency daily, weekly, monthly, seasonal, yearly, and/or other pools by grades of any agricultural products received from its members and may co-mingle or pool any of the products delivered hereunder with other like products delivered by others or cause same to be done and remit or cause to be remitted to the Producer and other producers concerned, on the basis of the interest of each one therein, as payments in full for the products delivered by them and sold in said pool, the net average price received therefor after making the deductions provided for in this Contract with the object of causing all members whose products are sold therein to receive the same price for products of the same grade.
>
> "(7) The Association agrees to pay or cause to

be paid through its Management and Sales Agency to the Producer the amounts received for the said re-sale of said products sold separately or the amounts representing Producer's interest in products resold wherein his products are pooled or co-mingled with others as provided for in Paragraph 6 herein after making deductions to cover the following items in connection therewith: (a) repayment of advances made to Producer under Paragraph 4 of this Contract and interest on said advances; (b) reasonable charges for the services of receiving, handling and selling said agricultural products under Paragraph 5 of this Contract; (c) operating and maintenance expenses; (d) one dollar per year in payment of the official publication of the Association in case said publication is issued; (e) two per centum (2%) of the gross sales price received for the products of said member sold separately or of the amounts representing said member's interest in products sold wherein his products are pooled or co-mingled with others as funds belonging to the Association to meet its indebtedness and additional expenses, contribute to the Association's reserves (with which to acquire ownership of industries and enterprises and property in connection therewith and for other proper purposes), to pay interest on capital stock by way of dividends and for other proper purposes as provided for by the laws of Alaska pertaining to 'Co-operative Associations' under which the Association has been incorporated and by the By-laws of the Association.

"(8) The Association is hereby authorized to process or manufacture into changed or new products the products delivered hereunder and pay the

Producer as provided for in Paragraph 7, from the proceeds from resale of the changed or new products or at its discretion to pay a flat delivery price therefor to the Producer as full payment thereof and thereafter process or manufacture it into changed or new products on its own account and at its own expense as its own product and sell and retain the full proceeds thereof as amounts belonging to the Association."

Attempts to make the undisputed facts of this case fit into paragraphs (6) and (7) is like attempting to put together a picture-puzzle only to find that a number of pieces are left out while others do not fit into the pattern. There are a number of points to be considered in this regard:

(a) Paragraph (7) applies by its terms only if the Producer's products "are pooled or commingled with others as provided for in Paragraph 6 herein," unless they were "sold separately," as they were not. Now paragraph (6) provides a procedure by which the Association may establish pools "by grade" and "may commingle or pool any products delivered hereunder with other like products" delivered by others. The "object" is that of "causing all members whose products are sold therein to receive the same price for products of the same grade."

This language is significant. What is contemplated is, that "like" products "of the same grade" be commingled. Underlying this is the plain inference that such "like products" should be kept identifiable and not mixed with unlike products; they must be identifiable in order to follow their course of resale so that

"the amounts received for the said resale of said products * * * pooled or commingled with others as provided for in paragraph 6 herein" might be determined, in accordance with the terms of paragraph (7).

The practice of the parties was entirely different from that. Grade A milk was mixed with Grade B milk in the manufacture of various products. Then both grades of milk were commingled with various manufactured products. These products, which the accountant classified under the heading of the "creamery" operations in the dairy-creamery department, included the following: ice cream, popsicles, malted milk, chocolate milk, butter and powdered milk (R. 297). Then the Association had no egg department, so it handled the eggs that were produced by its shareholders and also eggs purchased on the outside for resale, as part of the creamery-dairy department (R. 276-7). The income from all these products was credited to the creamery-dairy department at Anchorage and it was impossible to make any segregation of income derived from any one of them (R. 258, 567-568), or even any segregation of the group of products classified as "creamery" from those classified as "dairy" (R. 298, 566-567). The accountant brought the Association's books into the courtroom so that counsel for plaintiff might try his hand at making any such segregation, which he did not (R. 569).

(b) If paragraph (7) were interpreted to apply to a pool conducted in accordance with paragraph (6) the dairymen in normal course would have insisted upon an accounting covering the proceeds of their milk at

the end of each two weeks or at least at the end of each month. Why would they wait until the Spring of the year following for their settlement, as they did? Paragraph (6) itself refers to "daily," "weekly" and "monthly" pools. The evidence is undisputed that by the end of each bi-monthly period the Association ordinarily had re-sold the milk delivered during the preceding two weeks (R. 513). It could have responded to a demand on the part of producers to account and remit the proceeds of resale under paragraph (7) at that time, if it could do so at all.

(c) Appellee, in order to explain the regular bi-monthly payments to producers for milk delivered must classify them as "advances" in order to avoid the connotation of "price," especially "flat delivery price" as employed in paragraph (8) of the contract. Viewed thus as voluntary payments, the Association might make them or not at its discretion. This would imply that the dairymen might be obliged to deliver their milk for the full year before getting any payment at all; see

Kansas Wheat Growers' Ass'n. v. Schulte
(1923) 113 Kan. 672, 216 Pac. 311, 315.

Such an interpretation would disregard not only the course of business adopted by the parties but also the most rudimentary facts pertaining to the dairy industry, wherein farmers must be paid promptly for their product or go out of business.

(d) The only mention in the contract of "advances" is in paragraph (4) thereof and it is clear that the framers of the contract intended by this word an en-

tirely different meaning than that placed upon it by plaintiff. Paragraph (e) provides:

> "The Association agrees that upon delivery of agricultural products hereunder it may make or cause to be made through its Management and Sales Agency such requested advances to the Producer on said products as in its discretion may be justified by the Producer's immediate needs and by marketing conditions."

By "advance" is meant a loan, under this paragraph. This is frequently true of this word in marketing contracts, as in

> *McCauley v. Arkansas Rice Growers' Co-operative Ass'n.* (1926) 171 Ark. 1155, 287 S.W. 419, 425.

where a loan to pay off a producer's mortgage was involved.

Paragraph (4) is clearly inapplicable. It refers to "requested" advances and no request was made therefor by producers (R. 192). Also, it mentions the "producer's immediate needs" whereas re-sale prices governed the payments, which were made to all producers alike (R. 573-574). Also, paragraph 7a provides for the deduction from the resale price of the product delivered of an amount "for repayment of advances made to producer under paragraph (4) of this contract and interest on said advances." No interest was ever charged (R. 192).

Finally, the only papers employed by the parties in which the word "advances" was employed were certain "remittance advices" and here the word is used to in-

dicate that bi-monthly payments had been made for milk "purchased." These "remittance advices" are illustrated by the exhibits of the plaintiff (Exhibit 5, R. 225; Ex. 8, R. 403; Ex. 10, R. 430; Ex. 13, R. 434; Ex. 16, R. 441 and Ex. 17, R. 525). One of these reads as follows:

"PLAINTIFF'S EXHIBIT No. 8 (R. 403)

"Remittance Advice—No Receipt Required

"Matanuska Valley Farmers Cooperating Association

"Palmer, Alaska

"Date of Invoice	Description	Gross Amt.	Discount or Deduction	Net Amt.
	Second 'milk pool' advance:			
	Total amount purchased	$1,947.26		
	20% of dollar value purchased		$389.45	
	Less 2% statutory reserve		7.79	
	Amount of second advance			$381.66

(Endorsed)
Clarence Quarnstrom"

Notice that this paper calls the total dollar amount of the bi-monthly deliveries during the year "total amount purchased". The word "advance" is used obviously only in the sense of "payment". The payment is computed as to the individual purchaser as "20% of dollar value *purchased*". This was the Association's way of apportioning its profits to the individual producer.

5.

Even if Paragraph (7) Were Held to Govern, When Interpreted in the Light of the Practice of the Parties, It Would Support the Position of Appellant Herein.

Under Paragraph (7) the Association agrees to pay "the amounts received for the said resale of said products" after making the following deductions:

> "(b) Reasonable charges for the services of receiving, handling and selling said agricultural products under Paragraph 5 of this Contract;
>
> "(c) Operating and maintenance expenses;
>
> "(d) One dollar each year in payment of the official publication of the Association in case said publication is issued;
>
> "(e) Two per centum (2%) of the gross sales price received for the products of said member sold separately or of the amounts representing said member's interest in products sold wherein his products are pooled or co-mingled with others as funds belonging to the Association to meet its indebtedness and additional expenses, contribute to the Association's reserves." (R. 63)

Now plaintiff based his demand for the sum deemed owing the dairymen by a process of reasoning illustrated by his Exhibit No. 3 (R. 182). In doing so, he took into account part of the Association's obligations, namely $83,807.54 for "Operating Expenses" and $45,121.31 "Indirect Overhead".

In restricting the "indirect overhead" to the sum of $45,121.31, however, plaintiff overlooked entirely the purpose that the accountant and the Association had in using that figure, and their method of treating "in-

direct overhead''. This was explained in detail by Mr. Allyn (R. 265-267) and by Mr. Snodgrass (R. 314-321, 504- 505, 521-522). The Association did not have a system of cost accounting, so it adopted a rule-of-thumb for want of a better standard in computing the profit credited to each department. This was solely for the purpose of guiding management in allocating the profit of the Association. What was done was to deduct a flat 12.494% of gross revenues in each department, regardless of sales or mark-up. The exception was, that only 7/12 of the amount deductible under this formula was charged to the Produce Department, on the theory that it was operating only five months out of the year and hence burdening the Association with cost (R. 314-317).

It is clear that this formula would be relevant only if applied to determine the cost of each department for the purpose of allocating the $2,800.00 for the year 1945, assuming that this amount could have been properly distributed (R. 352).

We come back, then, to the fundamental principle, that an interpretation of paragraph (7), as well as other provisions of the contract, must be made in view of the long established practice of the parties. As applied to paragraph (7) the following authorities are noteworthy in illustrating how a rigid, literal interpretation is to yield to the one adopted by the parties:

District of Columbia v. Gallaher, 124 U.S. 505, 31 L. ed. 526;

Holbrook v. Petrol Corporation (C.C.A. 9, 1940) 111 F.(2d) 967;

Carlyle v. Majewski (1933) 174 Wash. 687, 20 P.(2d) 79;

12 Am. Jur., "Contracts," 787-790, Sec. 249.

6.

In Practice the Parties Applied Paragraph (8); the Bi-Monthly Payments Were Prices for Milk Delivered on Cash Sales and the Annual Payments Were Dividends Proportioned Upon Such Sales.

At the trial below, plaintiff's counsel asked witnesses repeatedly whether any agreement had been concluded between the Association and the dairymen for the payment of a flat delivery price under paragraph (8). Of course he received a negative reply from some of the witnesses. The question calls for a conclusion of law, not for facts. Furthermore, paragraph (8) does not contemplate any supplementary agreement between the Association and the producer on the matter of delivery price. By the express terms of paragraph (8) the "Association is . . authorized . . at its discretion to pay a flat delivery price" (R. 64).

In 1 Alaska Compiled Laws Annotated, 1949, Sec. 29-1-1 being the Uniform Sales Act, a contract of sale and a sale are defined as follows:

> "Sec. 29-1-1 Contracts to sell: Sales. (1) A contract to sell goods is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the price.
>
> "(2) A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price."

We submit that under the well-established practice

of the parties, the bi-monthly payments in substance were prices for milk delivered on cash sales, and that the annual payments or credits were in the nature of patronage sales dividends. We emphasize, however, that the position of appellant, in urging that the judgment of the court below be reversed, does not turn upon this point. The question presented in this case relates to the determination of when and how the annual payment or credit is to be made. We submit that there is just one sound answer to that question irrespective of whether the contract and the practice of the parties is viewed as establishing an agency or a sales relationship.

Whether an agency or sales relationship is established in a given case can be determined, of course, only by an examination of all terms of a particular contract, taken in relation to the practice of the parties. Examples where a co-operative marketing contract has been held to be one of sale are:

> *Neith Co-operative Dairy Products Ass'n. v. National Cheese Producers Federation* (1934) 217 Wis. 202, 257 N.W. 624;
>
> *Texas Farm Bureau Cotton Ass'n. v. Stovall* (1923) 113 Tex. 273, 253 S.W. 1101.

When paragraph (8) is examined on this basis, a number of related points are presented:

(a) Paragraph (8) authorizes the Association to pay a flat delivery price as to all products delivered as it "may process or manufacture . . . into changed or new products". It is submitted that pasteurizing milk constitutes a "manufacture", or at least a "process" within the meaning of this language just as the Asso-

ciation's making other products was such. The process involved was explained clearly by the witness Mr. Snodgrass (R. 500-561), as follows:

The milk is dumped into a weighing vat at Palmer and the weight is recorded on a slip. It is then dumped into a pump vat and a sample is taken for testing butterfat content. A certain amount is kept out and separated. In the Summer when the milk test is low, cream is put back into the milk in order to raise the test from the average of that received from the producers to the average at which the Association markets it. In the Wintertime, skim milk is put back in to lower the average, and keep the butterfat content of the milk sold uniform the year through. Then the milk is hauled to Anchorage in a 1200-gallon stainless steel thermos bottle truck. There it is pumped into pasteurizers. After pasteurization it is run through a cooler, which reduces the temperature from 143 degrees down to about 50 degrees, and then it is bottled and capped in a bottling machine and placed into the cooler until delivery.

It is submitted that the milk has been "changed" with regard to such physical characteristics as butterfat content, sterilization, cooling, bottling and in other respects. The finished product is made fit for wider markets, and commands much more in the way of price.

Webster's New International Dictionary (2nd Ed.) defines "Process" as follows:

> "Process * * * a. To heat, as fruit, with steam under pressure, so as to cook or sterilize. b. To subject (esp. raw materials) to a process of manufac-

ture, development, preparation for the market, etc.; to convert into marketable form, as livestock by slaughtering, grain by milling, cotton by spinning, milk by pasteurizing, fruits and vegetables by sorting and repacking."

If the farmers of the Matanuska Valley needed legal support for this interpretation of paragraph (8), they had it in the form of a holding of the District Court for the Northern District of Washington, decided some years before the Member's Standard Marketing Contract was put into effect:

In re Alaska American Fish Co. et al. (D.C., W.D. Wash. 1908) 162 Fed. 498.

The court stated therein:

"The home office and principal place of business of the Washington corporation is at the city of Tacoma, its business was catching, preserving by salt, and marketing salt water fish, and it owned a plant for carrying on that industry in Alaska. Fish, as a commodity of merchandise, requires the application of process for its preservation, as well as labor in placing the same in suitable receptacles for handling and transportation. Therefore, I hold that the business of said corporation was a manufacturing business within the meaning of the bankruptcy law, and that it is subject to be adjudicated a bankrupt."

Also supporting their position are:

Gordon v. Paducah Ice Mfg. Co. (D.C., W.D. Ky., 1941) 41 F. Supp. 980;

France Co. v. Evatt (1944) 143 Ohio State 455, 55 N.E.(2d) 652;

In *Gordon v. Paducah Ice Mfg. Co.,* 41 F. Supp. 980, *supra,* the court considered the question whether the furnishing of ice for refrigerator cars used in transporting strawberries constituted the "production of goods for commerce" within the meaning of the Fair Labor Standards Act. The court ruled affirmatively and in the course of its decision referred to an administrative interpretation of the Act to the effect that the pasteurization of milk constituted a processing and "connoted a change in the form of the raw material" (p. 987).

(b) The Association processed or manufactured the milk "at its own expense and as its own product" within the meaning of paragraph (8). Much of what has been said in our discussion of paragraph (7), under heading 4 hereof, is applicable here. The underlying purpose of paragraph (8) would seem to be, to permit the Association to purchase products at a flat delivery price where it uses its plant and facilities, and incurs expense, in processing and manufacturing them so as to materially increase their value or marketability.

(c) Paragraph (8) in this respect is to be construed with paragraph (2), which provides as to passage of title:

> "(2) * * * This contract is intended by the parties hereto to pass an absolute title to all said agricultural products as soon as the same have a potential existence, but they shall be at the risk of the Producer until delivery hereunder, except dairy products and except livestock accepted for resale, and title to these does not pass until delivery thereof hereunder." (R. 60)

(d) The Association did "retain the full proceeds thereof as amounts belonging to the Association" as provided in paragraph (8). We have already described its practice in handling the proceeds of resale, and in maintaining its accounting system, under which the monies received from all creamery-dairy sales were treated as belonging to the Association.

(e) The bi-monthly payments were substantial and represented a quid pro quo for the milk delivered. From April 22, 1943 until August 1, 1945 this price was $6.70 per hundredweight of milk with four per cent butterfat test with a differential of six cents per hundredweight for each 1/10 of 1% butterfat above or below 4%. On September 1, 1945 this price was increased to $7.20 and on September 16 to $7.70, with the same allowance for butterfat differential (R. 349-350). In addition, a "winter bonus" of so much per hundred was paid during winter months to stimulate production. This was 50c per hundredweight from September 1, 1944 to March 1, 1945 (Defendant's Exhibit 9, R. 558).

Such prices compared favorably with those paid elsewhere for milk. With the exception of the years 1940 and 1941 the dairymen received from the Association about 50% of the consumer's dollar, *i.e.,* the amount paid by the consumer at the point of purchase for final consumption, without including any annual payment or "overage" (R. 346-347); with the annual payment, this ran about 60% in those years (R. 347). In other places, the range for the corresponding period was from about 40% to about 60% with the average about 50% (R. 348).

(f) What the producers received when they delivered their milk were in substance sales slips, not slips referring to any advance. The slips showed the number of pounds of milk the producer delivered, the butterfat test, the price of the milk and the amount of money to be paid to him (R. 210-211, 437).

7.

Payment of the Amount Demanded Would Constitute a Payment Out of Capital in Violation of the Laws of Alaska, the Articles and By-Laws of the Corporation.

The principle involved is stated in Fletcher, Cyclopedia of Corporations, Sec. 5329, as follows:

> "It is a well-settled principle that, as between the stockholders of a corporation and its creditors, the assets of the corporation are, in a sense, a trust fund for the payment of its debts, and they cannot lawfully be distributed among the stockholders, even in part, to the prejudice of creditors. * * * It is a settled rule, therefore, even in the absence of any statutory provision, that a corporation cannot lawfully declare dividends out of the corporate stock, and thereby reduce the same, or out of assets."

The provisions of the statute on Cooperative Business Corporations, under which appellant is incorporated, make it clear that dividends are to be payable only out of net earnings. This statute, being Title 26, Alaska Compiled Laws, 1949, Sec. 36-3-8 and following, provides:

> "Sec. 36-3-8. *Disposition of earnings.* The directors, subject to revision by the Association at any regular or special meeting and not less than once

each year, shall apportion the earnings of the association by first paying a dividend on the paid up capital stock, not exceeding eight per cent per annum, then setting aside not less than ten per cent of the net profits for a sinking fund, to be used in accordance with the by-laws of the association, and five per cent thereof for an educational fund to be used in teaching co-operation, and the remainder of said net profits shall be prorated by a uniform dividend to its several stockholders or other customers upon their purchases from, or sales to, said association or both such purchases and sales, and upon salaries of employees. (L. 1917, ch. 26, Sec. 8, p. 50; C.L.A. 1933, Sec. 998)''

Statutes imposing personal liability on corporate directors for the payment of dividends out of capital have been construed to apply to co-operative as well as to other types of corporations:

Breon v. Ford (1924) 182 Wis. 616, 197 N.W. 195;

Casterland Milk & Cheese Co. v. Shantz (1919) 179 N.Y.S. 131.

In *Breon v. Ford,* 197 N.W. 195, *supra,* the court stated:

''Applying this principle to the contents of the 5th paragraph we reach the conclusion that the pleader intended to and did allege what the defendants received were only the customary trade discounts that were given by stores generally in that vicinity to their customers, and that these discounts were given to all customers of this company whether members or not. So construing the answer, we think that the trial court erred in sustaining the

> demurrer. If the proof should disclose that the so-called discounts were not ordinary trade discounts but were in fact dividends declared out of capital and not out of net profits, then there would be liability on the part of the defendants to repay them."

In *Casterland Milk & Cheese Co. v. Shantz,* 179 N.Y.S. 131, *supra,* the plaintiff-co-operative sued a shareholder to enforce a co-operative marketing contract. The defense and counter-claim set up by defendant was that plaintiff had failed to pay a dividend as agreed in the contract. The court used this significant language in disposing of this point:

> "The defendant sets up, both as a defense and counter-claim, the failure of the plaintiff to pay dividends upon the capital stock and also certain over-payments of dumpage which he claims was deducted by plaintiff from his dividends. It is quite true that the agreement provided for the payment of dividends at the rate of 5 per cent per annum but in making this agreement the parties must be presumed to have had in mind the provision of the Stock Corporation Law which forbids directors declaring dividends except from surplus profits, and the agreement must be read and construed in connection with that statute." (pp. 134-135)

By the same token, the common law prohibition against the payment of dividends out of capital would apply to a co-operative association and its marketing contract would be construed in reference thereto.

We have noticed that the Articles and By-laws of the Corporation are adopted as part of the Standard Member's Marketing Contract by the express terms of para-

graph (1) thereof (R. 60). Even in absence of such a provision, it has been held that a member's contract with a non-profit corporation must be construed with its Articles and By-laws, and that if there is any conflict the terms of the latter govern:

Fletcher, Cyclopedia of Corporations (Perm. Ed.) Sec. 4198;

Miller v. National Council Knights and Ladies of Security (1904) 69 Kan. 234, 76 Pac. 830;

Order of United Commercial Travelers of America v. Nicholson, 9 F.(2d) 7.

Appellant's Articles of Incorporation were drawn to conform with the above statute. Article III, Sec. 2 thereof provides:

> "Non-cumulative dividends in the nature of interest only and not to exceed eight per cent per annum may be paid upon each share of stock if, as and when declared, and net earnings may be apportioned in accordance with patronage after the setting aside of the required reserves, as are provided for in the Compiled Laws of the Territory of Alaska, 1933, pertaining to 'Co-operative Associations' and as are further set forth in the by-laws of this Association. This Association is formed to function on a co-operative basis for the mutual benefit of its members and on account of this fact dividends which are herein regarded simply as interest have been restricted as herein set forth."

In conformity with the foregoing provisions of the Articles, Section 3 of Article XII of the By-laws provides:

> "Section 3. PRODUCING AND SELLING.

The Board of Directors shall cause to be prepared a Member's Standard Marketing Contract by the signing of which a share of common stock in the Association is subscribed for at the par value of Five ($5.00) Dollars and membership is acquired in the Association and the member is bound to produce, prepare for market and sell all his agricultural products which are for sale to or through the Association or its agencies under such terms as the contract shall provide *and under such rules and regulations as the Association or its agencies shall make, said terms of contract and said rules and regulations to cover all stages of agricultural activities, including production, preparing for market and sale;* the Association to handle and sell such products singly or pooled and return to the member his net proceeds therefrom *after deducting for expense and Association obligations, including reserves and interest on shares of stock and other proper deductions have been made.* Said contract shall contain all other terms which the Board of Directors deem necessary or desirable to make the contract workable and effectual and protect the interest of the Association and its members. The contract shall include in its terms the penalties and remedies which under the laws of Alaska apply to marketing contracts, including liquidated damages, expenses and fees in case of lawsuits, and the rights of injunction and specific performance and shall recite the liability which the law attaches to any inducement to breach the contract or false representations made concerning the finances or management of the Association."

This section, again, makes it clear that any member

sells his produce in accordance with "such rules and regulations as the Association or its agencies shall make", as well as in accordance with the marketing contract itself. Also, the section makes clear that the Association is to pay the net proceeds therefrom after deducting "for Association obligations". These Association obligations are not simply maintenance and operating expenses literally and narrowly construed, but include "reserves and interest on shares of stock and other proper deductions."

Thus the Articles and by-laws of the Association, as well as the statute under which it was incorporated, make it clear that appellant is not entitled to the profit shown in a particular department of the Association where to draw that down would deplete its capital.

In conclusion, the judgment of the lower court should be reversed.

Respectfully submitted,

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No. 12,544

IN THE

United States Court of Appeals

For the Ninth Circuit

MATANUSKA VALLEY FARMERS COOPERATING ASSOCIATION, a Corporation,

Appellant,

vs.

C. R. MONAGHAN,

Appellee.

Appeal from the District Court of the Territory of Alaska, Third Division.

BRIEF FOR APPELLEE.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Texts

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BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

The Appellee, plaintiff in the Court below, during the period beginning December 1, 1944, and ending November 30, 1945, was engaged in the dairy business at or near Palmer, Alaska. During the period mentioned he sold his milk to the Appellant, defendant below, according to the terms of a written Contract entered into between himself and the defendant Association on June 30, 1939.

The Contract is called the "Members Standard Marketing Contract", hereinafter referred to as the

Contract. It is set forth in full on pages 58 to 73 of the Transcript of Record.

One of the prerequisites of becoming a member of the Matanuska Valley Cooperating Association was the signing of this Contract by the producer (Code of By-Laws, Article IV, sec. 4, and Article XII, sec. 3, Defendant's Exhibit No. 2).

The Contract bound the plaintiff to sell his milk to the defendant Association and the Association became bound to pay for the same according to the terms of the Contract.

The plaintiff brought this action to recover from the defendant the balance claimed to be due him, according to the terms of the Contract, on the purchase price of milk sold and delivered by him to the defendant during the period beginning December 1, 1944, and ending November 30, 1945. This period is hereinafter referred to as the year 1945. Besides plaintiff's cause of action his complaint includes twenty-one other causes of action based upon the assignment to plaintiff of the claims of twenty-one other dairymen, all of whom sold milk to the defendant Association during the same period and on the same terms.

The manner, method and terms of payment for produce bought and sold are set forth in paragraphs (5), (6), (7) and (8) of the Contract. Paragraphs (7) and (8) relate to the manner of arriving at the purchase price.

Paragraph (7) is as follows:

"(7) The Association agrees to pay or cause to be paid through its Management and Sales Agency to the Producer the amounts received for the said resale of said products sold separately or the amounts representing Producer's interest in products resold wherein his products are pooled or co-mingled with others as provided for in Paragraph 6 herein after making deductions to cover the following items in connection therewith: (a)repayment of advances made to Producer under Paragraph 4 of this Contract and interest on said advances; (b) reasonable charges for the services of receiving, handling and selling said agricultural products under Paragraph 5 of this Contract; (c) operating and maintenance expenses; (d) one dollar each year in payment of the official publication of the Association in case said publication is issued; (e) two per centum (2%) of the gross sales price received for the products of said members sold separately or of the amounts representing said member's interest in products sold wherein his products are pooled or co-mingled with others as funds belonging to the Association to meet its indebtedness and additional expenses, contribute to the Association's reserves (with which to acquire ownership of industries and enterprises and property in connection therewith and for other proper purposes), to pay interest on capital stock by way of dividends and for other proper purposes as provided for by the laws of Alaska pertaining to 'Cooperative Associations' under which the Association has been incorporated and by the By-Laws of the Association."

Paragraph (8) is as follows:

> "(8) The Association is hereby authorized to process or manufacture into changed or new products the products delivered hereunder and pay the Producer as provided for in Paragraph 7, from the proceeds from resale of the changed or new products or at its discretion to pay a flat delivery price therefor to the Producer as full payment thereof and thereafter process or manufacture it into changed or new products on its own account and at its own expense as its own product and sell and retain the full proceeds thereof as amounts belonging to the Association."

The complaint alleges that the dairymen sold their milk to the defendant according to the provisions of paragraphs (6) and (7) of the Contract (R. 3, par. IV).

The answer admits that the milk was bought and sold under the terms of the Contract but denies that the transaction was according to the terms of paragraphs (6) and (7) and alleges on the contrary that the milk was sold and purchased at a fixed price per hundred pounds.

Thus, the only substantial issue raised by the pleadings is whether or not the sale of milk by the dairymen to the Association was made according to paragraphs (6) and (7), or according to paragraph (8) of the Contract. That is to say, whether or not the milk was sold at a fixed flat price or whether it was sold at a price to be determined by the net proceeds of the resale of the milk by the defendant Association

after making the deductions set forth in paragraph (7).

The trial Court determined this question in favor of the plaintiff (R. 126-127, Findings of Fact V).

ARGUMENT.

The Appellant contends that this case comes to this Court presenting essentially questions of law (Appellant's Brief, page 8). The Appellee contends that this case was tried in the lower Court and comes to this Court on the only issue raised by the pleadings, as stated above in Appellee's statement of the case, and essentially on questions of fact.

No error is assigned other than those based on the trial Court's Findings of Fact and the Court's refusal to make certain Findings of Fact suggested by the defendant, except the formal assignments of error, that the Court erred in its Conclusion of Law, that the plaintiff was entitled to recover from the defendant the sum of $28,700.60 and certain interest, and that the Court erred in rendering its judgment for the plaintiff and against the defendant (R. 134-141).

In Appellant's Brief (page 7), the Specifications of Error are that the District Court erred as to Finding of Fact V (R. 126-127) and as to its Conclusion of Law that the plaintiff was entitled to recover the amount above stated, and in making and entering judgment accordingly.

This Brief, therefore, will be limited to an analysis of the evidence in the case. It is not found necessary to seriously dispute any of the propositions of law advanced by Appellant, nor to determine whether or not they are sustained by the authorities cited.

REVIEW OF TESTIMONY.

To sustain the allegations of the complaint that the dairymen sold their milk to the defendant Association under paragraph (7) of the Contract, the plaintiff of necessity had to rely to a large extent upon the accounts and books of the defendant Association, written statements furnished by it, and testimony of its officers.

Roland Snodgrass was called on behalf of plaintiff. He testified that he was a member of the Board of Directors of the defendant Association during 1941, 1942 and 1943. That he was its manager from January 1944 until February 1946 (R. 345). That he was a member of the Association and sold milk to the defendant in 1940, '41, '42, '43 and '44, but not while he was manager.

Roland Snodgrass testified in part as follows:

> Q. (by Mr. Grigsby). Did you ever in any of those years when you sold and delivered milk to the defendant corporation sell it at a fixed price that you were to ultimately get for your milk so sold and delivered?
>
> A. Yes, it is my opinion that I did every year.

Q. What is that?

A. I did every year.

Q. At a fixed——

A. At a fixed price.

Q. A fixed final price?

A. In some cases it became final and some cases it did not become final.

Q. But did you ever agree with the Co-Op at the beginning of any fiscal year for what ultimate price you would sell your milk—flat figure?

A. Yes, I did.

Q. All right, every year?

A. I'll tell you what I did if it will help.

Q. What is that?

A. The first year I agreed to sell, at a fixed flat price.

Q. Then how about the second year?

A. All right, the second year there was no agreement made; they simply raised the price and we went on. There was no new agreement. The first year I agreed to sell at a certain price.

Q. All right now, haven't you every year since '42 delivered your milk and received certain payments upon delivery, or——

A. Yes.

Q. On the total deliveries for each bi-monthly period?

A. That's right.

Q. And then been paid additional sums for that milk subsequent to the Audit?

A. That's right.

Q. That is true, isn't it?

A. That is true.

Q. That was true of '44?

A. That was true of '44.

Q. That was true of 1943?

A. That is right.

Q. And it was true of '42?

A. That's correct.

Q. But in '41 you sold for a fixed flat price?

A. No, I received an additional payment in 1941.

Q. You got additional payments in 1941 also?

A. That's right.

Q. All right now, in the milk you sold in '45, did you sell your milk for a flat ultimate price?

A. In 1945 I sold no milk.

Q. You were working in the office?

A. That's right.

Q. Did anybody sell any milk at a flat fixed ultimate price in '45?

A. You mean did they agree to sell it or did they sell it?

Q. Did they agree to sell it for so much per one hundred pounds?

A. There was no agreement that I know of to that effect. (R. 336-337).

* * * * * * *

Q. However, you never did agree to take a flat price for your milk, at any time for your milk sold in '42-3 or '44?

A. No such agreement. I made such an agreement, to clear the record in 1940 to take a flat price.

Q. For that year?

A. For that year.

Q. But you always have received additional payments after the audit?

A. In 1941-42-43 and '44. (R. 340).

* * * * * * *

Q. All right then, now you didn't so state. Now, I am asking you if from the time the Co-Op started delivering milk in Anchorage and selling it here, on any scale to amount to anything, in 1940, has the Co-Op ever purchased milk from the dairymen at a flat fixed final price?

A. No. Now we are getting where we can make sense. As I said the last time you asked me, I sold milk at a flat price in 1940 because there wasn't any suggestion of anything more or anything less—in 1940. Now, you ask me things about flat price and so on, but when you used the word "final" I can say no.

Q. All right, since 1940 you always have made the farmers additional payments after the close of the fixed fiscal year?

A. That is correct, yes.

Q. For their milk?

A. That is right.

Q. And have you not then paid the farmers ever since '40 according to the terms of paragraph (7) of this Contract?

A. Just as closely as we could.

Q. That is what you have tried to follow?

A. That is what we have tried to follow.

Q. All right, and after deducting operating expenses and indirect overhead, and then, according to paragraph (7) they are entitled to all the net, aren't they?

A. Well——

Q. Well, are they or are they not?

A. According to paragraph (7) I believe they are entitled to all the net after those deductions.

Q. And you have been trying to pay them off as near as you could according to paragraph (7)?

A. That is correct. (R. 373-375).

* * * * * * *

Q. I will read you section (8):

"The Association is hereby authorized to process or manufacture into changed or new products the products delivered hereunder and pay the Producer as provided for in Paragraph 7, from the proceeds from resale of the changed or new products or at its discretion to pay a flat delivery price therefor to the Producer as full payment thereof and thereafter process or manufacture it into changed or new products on its own account and at its own expense as its own product and sell and retain the full proceeds thereof as amounts belonging to the Association."

Now, you have never done that since 1940 in dealing with the milk farmers?

A. We have not done it since 1940.

Q. You have never told any seller of the price—that he was selling his milk at a flat fixed price?

A. No. That is right.

Q. And you know that hasn't been done?

A. That is correct. (R. 378).

The plaintiff Monaghan and seven of the dairymen who assigned their claims to him testified for the plaintiff. They were John Lyle Cope, Walter E. Huntley, Wilhelm Ising, Arvid Johnson, Frank McAllister, Clarence Quarnstrom and Aaron A. Rempel.

McAllister testified that he signed the Contract on June 30, 1939; that he had been in the dairy business for the past five years. (He testified on March 13, 1947). During that time he sold all his milk to the defendant Association under the terms and conditions of the Contract.

Q. Did you ever sell them any milk for a flat price?

A. I did not.

Q. Have you been advanced money when you delivered milk on account of the purchase price?

A. I have.

Q. And that's every year?

A. Every year. (R. 174).

The witness further testified that during every year mentioned he received an advance payment upon delivery of his milk and for the years 1942, 1943 and 1944 received additional payments over and above the payments advanced (R. 176).

He produced a statement furnished by the Association showing the amount of milk sold by the dairymen interested in this suit and the amount advanced therefor for the fiscal year 1945, the period from December 1, 1944, to November, 1945, which was introduced in evidence as Plaintiff's Exhibit No. 2 (R. 179).

We append here the extracts from the testimony of Arvid Johnson which seem to dispose of this question and also to completely demolish the flat or fixed price contention.

Arvid Johnson testified that he was one of the claimants in the case, and as follows:

Q. Now, with reference to milk: In 1944, it is in evidence here, that additional sums of money—you call them payments—were paid to the milk producers for the product of 1943. That was true in your case, was it?

A. That's right.

Q. Now, did you receive additional payments in 1943 for the '42 production?

A. Yes.

Q. And how far back did that go?

A. If I recall I think we received money in 1941 and also in 1944, that is up to 1944.

Q. For the production of the previous year?

A. That's right.

Q. And in 1945 you received money for the 1944 production?

A. Correct.

Q. In addition to the down payments?

A. Yes. (R. 423-424).

* * * * * * *

Q. Mr. Johnson, have you any of the slips showing those additional payments with you?

A. I have for 1943 and '44 (handed to Mr. Grigsby).

Q. And here is one dated September 10, 1945?

A. Well, that's for '44. (R. 428).

* * * * * * *

Q. This check here "Second Payment on Milk Pool: 20% of dollar value $6187.25"; now, do you remember when you got that—what year?

A. Well, that was paid I believe in April 1945 and the other one was paid along in September, 1945.

Q. Now, there must have been a first payment prior to that time?

A. Well, your first payment is what you get every two weeks. (R. 428-429).

In connection with Arvid Johnson's testimony, two slips were introduced in evidence identified by him as remittance advices showing additional payments made to him in 1944, for the milk sold by him in 1943; these two slips were introduced as Plaintiff's Exhibit No. 10. (R. 430).

Johnson also identified two slips showing additional payments made to him in 1945 for milk sold by him in 1944. (Plaintiff's Exhibit No. 11, R. 431).

Plaintiff's Exhibits Nos. 12 and 13 show the same situation with regard to payments made to Wilhelm Ising. (R. 433-435).

Aaron A. Rempel, one of the claimants, testified that he came to Palmer, Alaska, on February 18, 1944, joined the Association and started to deliver milk the first of March; that before he started delivering milk he had a conversation with Roland Snodgrass, the manager of the Association, as to the price he was to get for his milk; that Snodgrass explained to him that he would receive a down payment for his milk of better than $6.00 for one hundred pounds. (R. 388). Rempel then testified as follows:

Q. And go ahead, what's the rest of the conversation—the explanation?

A. The manager explained that after the year's over then what is made, profit, on the milk

is divided and you recover in two payments. He just had received one payment. I don't remember exactly what his check was but it was a payment he got and he expected another payment sometime later in the year.

Q. He showed you a check?

A. He had a check in his hand. He showed me he just got a check.

Q. That was the additional payment for the '43 operations, was it?

A. Yes, '43. (R. 389).

* * * * * * *

Q. Along in March, when you were talking to him he had got a pretty substantial payment and would get another one?

A. Yes, it was in February I talked to him—the first of March I started already to deliver milk.

Q. And that was his explanation to you of how you're paid for your milk and how you would be paid?

A. Yes. (R. 387-390).

Roland Snodgrass had previously testified that he was manager of the Association from January, 1944, to February 5, 1946, (R. 345). He was subsequently called as a witness but did not contradict the testimony of Aaron Rempel, above quoted, with reference to the explanation made to him as to how he was to be paid for his milk.

The other dairymen called as witnesses by the plaintiff, including the plaintiff himself, testified to substantially the same facts shown by the testimony above quoted, that is, with reference to the terms on

which they sold their milk during the period in question and in prior years and as to their understanding of the Contract.

The remaining fourteen dairymen interested in this suit were not called as witnesses. However, it was stipulated by the plaintiff and defendant that the remaining claimants would testify in substance that for the year's production, commencing with 1942, 1943, and including 1944, they received after the close of the year, substantial sums of money as second and final payments, in substance as these witnesses who had been on the stand and testified. (R. 441-442).

The payments made to the dairymen after the close of the fiscal year are evidenced by the slips introduced in evidence as Plaintiff's Exhibits 5 (R. 225), 7 (R. 397), 8 and 9 (R. 403), 10 (R. 430), 11 (R. 431), 12 (R. 433), 13 (R. 434), 14 (R. 436), 15 (R. 440), 16 (R. 441) and 17 (R. 525).

These exhibits and the testimony given in connection with their admission prove beyond any doubt that beginning with the year's production for 1943, which means the period from December 1, 1942, and ending November 30, 1943, the amount of the additional payments after the audit made after the close of the fiscal year was figured on a percentage of the amount paid in cash upon delivery of milk, that is, the total of the cash payments made bi-monthly after delivery.

The system used is explained by the testimony of the plaintiff Monaghan (R. 246), who testified on cross-examination as follows:

A. These slips were issued after the audit, and when they got their preliminary figures from the auditor the first time that they paid the 20% —see, that would be in the spring of '44—they says we haven't the final audit but we do know that we can safely make a part payment on it. If the farmers needed money to operate in the spring, that we would, we can pay 20% safely, we know, now and they did so. Then after the—they got the books back from the auditor he had gone back to Juneau and took the books back and when they got their final figures and everything was all paid off—everything—all the deductions and everything—we got the balance from the second payment (R. 246).

The remittance slips introduced in evidence and heretofore listed were furnished by the defendant Association. They all designate the additional payments, made after the close of the fiscal year, either as "Final payment on milk pool", "Second milk pool advance", "Second payment on milk pool" or "Final payment milk and cream pool".

REPORTS OF AUDIT.

After the close of each fiscal year the Association had their books audited by a firm of accountants. The Report of Audit for the period ending November 30, 1945, was introduced in evidence as Plaintiff's Exhibit No. 6.

The Report of Audit for the period ending November 30, 1944, was introduced in evidence as Defendant's Exhibit No. 1.

Both these exhibits were very voluminous and in accordance with a stipulation (R. 603-4) are not printed in the record but are before the Court in their original form. Pages 2, 3 and 4 of Plaintiff's Exhibit No. 6 comprise a comparison by units of the results of operations of the Association for the year 1945 and 1944.

At the beginning of page 2 of this exhibit is the following statement:

> OPERATING RESULTS:
> THE RESULTS OF OPERATIONS FOR THE FISCAL YEAR ENDED NOVEMBER 30, 1945, ARE SHOWN IN DETAIL ON EXHIBIT "B". A CONDENSED COMPARISON WITH THE FISCAL YEAR ENDED NOVEMBER 30, 1944, AFTER GIVING CONSIDERATION TO ADDITIONAL PAYMENTS TO PRODUCERS FOR MILK AND EGGS PURCHASED IN 1944, APPEARS BELOW.

On page 3 of the exhibit the following note is appended:

> (1) AFTER GIVING EFFECT TO ADDITIONAL PAYMENTS TO MILK AND EGG PRODUCERS OF $47,528.40.

On page 16 of the same exhibit are the following notes:

20% ADDITIONAL PAYMENT TO MILK PRODUCERS	$22,563.31
21.125 ADDITIONAL PAYMENT TO MILK PRODUCERS	23,355.89
ADDITIONAL PAYMENT TO EGG PRODUCERS	1,609.20

The above figures total $47,528.40 and show that the sum of $45,919.20 was the total of additional payments made in 1945 for the milk sold to the defendant Association during the fiscal year ending November 30, 1944.

Similar data appears in Defendant's Exhibit No. 1, which is the Report of Audit for the period ending November 30, 1944.

On pages 3 and 4 of this latter exhibit is a comparison of the results of the operations of the years 1944 and 1943, and on page 3 of the exhibit the following note is appended:

> (1) Additional payments to producers of milk, cream, eggs, and meat in the amount of $47,516.19, for 1943 were made in 1944 and charged against 1943 income.

These same additional payments are also noted on page 6 and again on page 16 (Note 3) of Defendant's Exhibit No. 1.

The foregoing extracts from the Association's Reports of Audit demonstrate that the Association designated the additional payments made to milk producers after the close of the respective fiscal years, as payments, and regarded them as payments on the purchase price, and not as dividends, or pro-rata distribution of profits as contended by Appellant.

The Reports of Audit revealed even more convincing evidence than the foregoing.

On page 17 of Defendant's Exhibit No. 1, the Cost of Goods Sold by the Creamery-Dairy Unit is entered

as $129,729.54. Likewise, on page 4 of Defendant's Exhibit No. 1 the Cost of Goods Sold is carried as $129,729.54. On page 4 the Creamery-Dairy Unit is designated as Unit No. 13-14. Page 4 is a comparison by units of the operations of 1944 and 1943.

Now, turning back to page 4 of Plaintiff's Exhibit No. 6, we find a comparison by units of the operations of 1945 and 1944. On this page the Creamery-Dairy Unit is likewise designated as Unit No. 13-14. But on this page, the Cost of Goods Sold in 1944 is carried at $177,257.94, which is exactly the total arrived at by adding to the sum of $129,729.54 the sum of $47,528.40, being the amount of additional payments made in 1945 for milk and eggs bought in 1944, as appears in the note appended to page 3 of Plaintiff's Exhibit No. 6, and hereinbefore cited.

In other words, the Association during the period from December 1, 1943, to November 30, 1944, paid for the creamery-dairy goods the sum of $129,729.54. In 1945 the Association made additional payments to the dairymen and egg producers of $47,528.40 and added it in to the item, Cost of Goods Sold $129,-729.54, arriving at the sum of $177,257.94, as the total purchase price or cost of the goods sold by the creamery-dairy during the period ending November 30, 1944.

Nowhere in the records, audits or minute books of the Association is the word "dividend" used in connection with additional payments made to producers for their products sold to the Association during the previous year.

The plaintiff and the dairymen called as witnesses have all testified that they sold their milk under the terms of paragraph (7) of the Contract and have produced written evidence supporting their testimony.

The witness, Roland Snodgrass, the manager of the defendant Association, corroborated their testimony.

It has been stipulated that the fourteen dairymen interested but not called as witnesses would, if called, have testified substantially to the same effect (R. 441-442).

The dairymen interested in this action represent about 60% of the total amount of milk sold to the Association in the fiscal year ending November 30, 1945 (R. 593-594), and about the same percentage of the number of dairymen (R. 196).

None of the other 40% have been called as witnesses for the defendant, in fact no witness was called by defendant Association who testified that he sold his milk during the period mentioned at a flat price, under the provisions of paragraph (8) of the Contract.

EVIDENCE FOR DEFENDANT.

The only evidence produced in support of Appellant's flat price contention consists of Defendant's Exhibits Nos. 4, 6, 7, 8, 9 and 10 (R. 306, 551, 554, 556, 558 and 561).

Defendant's Exhibit No. 4 is a schedule of "Milk prices paid to farmer" from December 1, 1941, to October 1, 1946.

Defendant's Exhibit No. 6 purports to be the minutes of a meeting of the Board of Directors of February 10, 1943, showing that McAllister (one of the claimants) moved that a schedule of milk and cream prices be established subject to confirmation at the next meeting, the proposed schedule being included in the motion.

Exhibit No. 7 is the minutes of a meeting of the Board of Directors of February 13, 1943, confirming the proposed schedule but designating it as a schedule of "Milk and cream *payments*" (italics ours).

Exhibits Nos. 8 and 9 have no apparent relevancy to the issue.

Exhibit No. 10 relates to 1946 and is at least as consistent with Appellee's contentions as were those of Appellant.

The witness McAllister thoroughly explained, both on direct and cross-examination, that the bi-monthly payments for milk delivered were advance payments. The prices adopted were advance prices, for the milk delivered (R. 174-176, 190-192, 209-212). No witness has contradicted his testimony and it is corroborated by all the record evidence in the case.

ARGUMENTS OF APPELLANT IN SUPPORT OF FLAT PRICE CONTENTION.

What is lacking in testimony to support the flat price contention, the Appellant endeavors to supply by argument. In the Brief of Appellant on pages 27 and 28 is the following statement:

> "(b) If paragraph (7) were interpreted to apply to a pool conducted in accordance with paragraph (6) the dairymen in normal course would have insisted upon an accounting covering the proceeds of their milk at the end of each two weeks or at least at the end of each month. Why would they wait until the Spring of the year following for their settlement, as they did? Paragraph (6) itself refers to 'daily,' 'weekly' and 'monthly' pools. The evidence is undisputed that by the end of each bi-monthly period the Association ordinarily had resold the milk delivered during the preceding two weeks (R. 513). It could have responded to a demand on the part of the producers to account and remit the proceeds of resale under paragraph (7) at that time, if it could do so at all."

We call attention to the following sentence contained in the foregoing statement:

> "Paragraph (6) itself refers to 'daily,' 'weekly' and 'monthly' pools."

The writer of the Brief neglected to mention that paragraph (6) refers to daily, weekly, monthly, seasonal, yearly and/or other pools (R. 62). This omission seems deliberately unfair since the undisputed evidence is that the Association did establish a yearly milk pool. Furthermore, the contention of Appellant is absurd because it is perfectly apparent from the evidence in the case that a monthly accounting to the dairymen would have involved a monthly audit of all the uits in order to determine the balance due the dairymen after the deduction of their proportionate share of the general and administrative expenses of

the Association. At any rate, the dairymen did not insist on such an accounting but were satisfied with a reasonable bi-monthly cash payment sufficient to enable them to carry on their business, until the balance due them could be determined after the annual audit.

It is true that the individual producers did not separately appear before the Association and request advances on their delivered produce and place upon the Association the burden of inquiring into the financial situation and needs of each individual dairyman. That system would have required the establishment of another department. Instead of such a system the evidence shows that the Association adopted as a substitute a system of paying an established advance price. This is shown by the exhibits introduced by the defendant Association and this advance price applied both to milk producers and other producers, the potato farmers being advanced a stipulated sum per ton.

Appellant also argues that the interest on advances was not deducted. As the milk was resold shortly after delivery and the advance price paid bi-monthly after resale, the dairymen never had the use of the Association's money, consequently, no interest was or could be charged.

In connection with the question of requested advances, it must be remembered that the Members Standard Marketing Contract was prepared long before the Association took over the assets of its predecessor, the Alaska Rural Rehabilitation Corporation,

referred to in the Contract as the Corporation, which established the Matanuska Valley Colonization Project with funds granted by the Government of the United States (R. 58-59). Pursuant to the plan of this colonization project "worthy and qualified persons", potential farmers, were shipped at the expense of the Government from the different States to the Matanuska Valley, there to be rehabilitated, furnished with homes and supported, all at Government expense, until they became self-supporting. Paragraph (4) of the Contract was designed for the benefit of these persons and was applied as "justified by the producers' immediate needs" (Paragraph (4)).

As under the terms of the Contract, the Association became the owners of the produce from the time it was in the ground, no doubt the Association was confronted with many requests for advances from these more or less penniless colonists. After the Association took over the assets of the Corporation in January, 1940, for the reason that the Corporation could not and would no longer finance the project (Testimony of Roland Snodgrass, R. 353-358), the project began to pay. About the middle of the year 1940 the Association bought out the East Side Dairy in Anchorage and started in the business of marketing milk in Anchorage (R. 357). Also about this time the war boom started, an Army Post was established at Fort Richardson, thousands of soldiers were brought in and millions of dollars spent by the Government, resulting in a greatly increased population and market for the

Matanuska products, and a large profit was made from the milk business.

Thereafter, the Association substituted for the system of "requested advances, justified by the producers' immediate needs and by marketing conditions" a system of uniform cash advance payments, and paid the producer the balance of the purchase price according to the provisions of paragraph (7) of the Contract, after the yearly audit had been made, as shown by the oral and record evidence in the case.

The Association continued to purchase the dairymen's milk under paragraph (7) of the Contract, but the system of making advances under paragraph (4) was adapted to the new conditions.

However, notwithstanding the favorable conditions above mentioned, the Association succeeded in losing money during the 1945 period in all its cooperative enterprises, except the Warehouse, Community Hall and Fountain, and Dairy-Creamery Unit. The Trading Post, with a grocery department, hardware department and dry goods department lost $10,095.64, the garage lost $20,331.29, the meat department $13,319.08, the produce department, that is, vegetable produce, $20,319.12.

Roland Snodgrass, the manager during this period, admitted that every garage and every grocery store in the Third Division of the Territory, except the Co-Op garage and grocery, made money in 1945 (R. 460).

The profits of the Association as a whole from December 1, 1944, to November 30, 1945, were $2,889.29.

The profits of the Dairy-Creamery Department were $57,001.58 (Plaintiff's Exhibit No. 6, page 19). After the audit of the year's operations made in February, 1946, the plaintiff dairymen demanded their share of this profit, that is, the amount due them under paragraph (7) of the Contract. They were informed that although they were morally entitled to the money there were no funds available (R. 198). There is no testimony in the record that the dairymen were then informed or at any time informed that they had been selling their milk at a flat price and that they had nothing coming.

It was after the commencement of this action that the flat price theory was evolved, which was later expounded by the testimony of the witness Snodgrass (R. 377-8).

Appellant further develops its flat price theory under paragraph 6 of its argument as follows (Brief, page 33):

> "In Practice the Parties Applied Paragraph (8); the Bi-Monthly Payments Were Prices for Milk Delivered on Cash Sales and the Annual Payments Were Dividends Proportioned Upon Such Sales."

This theorem is then demonstrated as follows:

> "(a) Paragraph (8) authorizes the Association to pay a flat delivery price as to all products delivered as it 'may process or manufacture * * * into changed or new products'. Pasteurizing milk constitutes a 'manufacture' or at least a 'process' ".

"(b) The Association processed the milk 'at its own expense and as its own product' within the meaning of paragraph (8)."

"(d) The Association did 'retain the full proceeds thereof as amounts belonging to the Association' as provided in paragraph (8)."

Therefore, in practice the parties applied paragraph (8) Q.E.D.

But, conceding for the purpose of argument that pasteurizing is "processing" within the meaning of paragraph (8) we contend:

1. That if purchased under paragraph (7) the milk would nevertheless have to be pasteurized;

2. That if purchased under paragraph (7) it would have to be pasteurized at the expense of the Association as its own product; and

3. We concede that for the production of 1945, at least, the Association did "retain the full proceeds thereof."

That is exactly what we are complaining about.

But there were no annual payments, as stated in Appellant's argument in paragraph 6.

Since and including 1941 there have been additional payments for the milk purchased the preceding year (Testimony of Snodgrass, R. 337), and these additional payments were prorated to the individual producers, where the milk was co-mingled or pooled, in proportion to their sales, and strictly as authorized by paragraph (7) of the Contract. These payments were

not "dividends" as Appellant contends and under the laws of Alaska, under which the Association was incorporated, could not be dividends.

It has been maintained by Appellant and is conceded by Appellee that from the time the Association went into the retail milk business in 1940 they purchased the dairymen's milk under the provisions of the Member's Standard Marketing Contract, and that, whether they purchased the milk under the provisions of paragraph (7) or paragraph (8) of the Contract, when delivered it became the property of the Association. When sold the proceeds of the sale became the property and assets of the Association.

This premise being agreed upon, Appellant's argument continues as follows (Brief, paragraph 7):

> "Payment of the amount demanded would constitute a payment out of capital in violation of the laws of Alaska, the Articles and By-Laws of the Corporation."

Appellant then quotes from Fletcher, Cyclopedia of Corporations, sec. 5329, as follows:

> "It is a well settled principle that as between the stockholders of the corporation and its creditors, the assets of a corporation are, in a sense, a trust fund for the payment of its debts and they cannot lawfully be distributed among the stockholders, even in part, to the prejudice of creditors. * * *"

Appellee emphatically agrees with this principle of law and invokes the same. Unquestionably the assets

of a corporation can be subjected to the payment of its debts, either by voluntary action, or by judgment and execution, as was necessary in the present case.

The writer of Appellant's Brief either does not or does not choose to recognize that the plaintiff in the Court below sued for the payment of a debt and not for a distribution of profits as dividends.

APPELLANT'S THEORY OF DISTRIBUTION OF PROFITS.

Paragraph 2 of Appellant's argument (Brief, page 16) is as follows:

> "The Interpretation of the Contract Under Long-Established Practice of the Parties Is to Be Given Great, if Not Controlling Consideration".

With this we agree.

In fact, Appellee's entire argument has, up to this point, been based upon the above proposition. It seems to be agreed that ever since the Association went into the dairy business in 1940 and up to the year in controversy, the Association, after the close of each fiscal year and after their books were audited, made additional payments to the milk producers for the milk sold the preceding year.

Appellant calls these payments "dividends", in paragraph 6 of its argument. Elsewhere in its Brief it contends that the payments were an "allocation of profits" (Brief, pages 20-21).

Appellee will now endeavor to demonstrate that any apportionment of profits of the Association, in the manner Appellant claims they were apportioned, would have been in violation of the laws of Alaska, the Articles of Incorporation and By-Laws of the Association.

Further than that, it will be demonstrated that the additional payments made to milk producers could not legally have been made, except as authorized by paragraph (7) of the Contract.

ARTICLES OF INCORPORATION.

The defendant Association was incorporated under the provisions of the Alaska Compiled Laws, Annotated, 1949, chaper 3 of Title 36, section 36-3-1 to section 36-3-8.

Section 36-3-4 contains the following clause:

> "For the purposes of this Act, the words 'company,' 'corporation,' 'association,' 'society' or 'union' are defined to mean a company, a corporation or association which authorizes the distribution of its earnings in part or wholly on the basis of or in proportion to the amount of property bought from or sold to members or other customers or of labor performed or other services rendered to the Association."

Section 36-3-5 provides:

> "7th. To make By-Laws for the management of its affairs and to provide therein the terms and

limitations of stock ownership and for the *distribution of its earnings within the limits of this Act.*" (Italics ours).

Section 36-3-8 is as follows:

"Sec. 36-3-8. *Disposition of earnings.* The directors, subject to revision by the Association at any regular or special meeting and not less than once each year, shall apportion the earnings of the association by first paying a dividend on the paid up capital stock, not exceeding eight per cent per annum, then setting aside not less than ten per cent of the net profits for a sinking fund, to be used in accordance with the by-laws of the association, and five per cent thereof for an educational fund to be used in teaching co-operation, and the remainder of said net profits shall be prorated by a uniform dividend to its several stockholders or other customers upon their purchases from, or sales to, said association or both such purchases and sales, and upon salaries of employees."

The last section quoted is set forth in full in Appellant's Brief, pages 39-40.

In conformity therewith the Articles of Incorporation of the Association were drawn.

Article III, section 2, of the Articles of Incorporation is as follows:

"Non-cumulative dividends in the nature of interest only and not to exceed eight per cent per annum may be paid upon each share of stock if, as and when declared, and net earnings may be apportioned in accordance with patronage after

> the setting aside of the required reserves, as are provided for in the Compiled Laws of the Territory of Alaska, 1933, pertaining to 'Co-operative Associations' and as are further set forth in the by-laws of this Association. * * *"

This also is set forth in full in Appellant's Brief, page 42.

It will be observed that section 36-3-8 limits the apportionment of the earnings of the Association to, first, a dividend not to exceed eight per cent on paid-up capital stock, and then after other apportionment of its earnings it provides that,

> "the remainder of said net profits shall be prorated by a *uniform* dividend to its several stockholders or other customers upon their *purchases from* or *sales to* said Association or *both such purchases and sales* and upon salaries of employees." (Italics ours.)

Article III, section 2, of the Articles of Incorporation above set forth, is drawn in conformity with the clause last above quoted and provides:

> "and net earnings may be apportioned in accordance with patronage after the setting aside of the required reserves, as are provided in the Compiled Laws of the Territory of Alaska, 1933, pertaining to 'Cooperative Associations' and as are further set forth in the by-laws of this Association."

It will be at once perceived that in accordance with the laws of Alaska, after certain specified apportion-

ments, the remainder of the net profits must be distributed as a dividend; that this dividend may be prorated solely upon *"sales to"* or *purchases from* the Association, *or both;* but that regardless of the basis of apportionment, the dividend must be *uniform* to the "several stockholders or other customers", who patronize the Association, and in proportion to their patronage. This requirement is in the law and in the Articles. The Association could no more limit the apportionment of profits to those stockholders who had sold produce to profit-making departments than to those who sold to departments which lost money.

In 1944 the sales by the vegetable farmers greatly exceeded the sales of the dairymen. On an apportionment of a dividend based on "sales to" the Association, the vegetable farmers would have received a far greater proportion thereof than the dairymen, although the Association lost money on the former and made a large profit on the sales of milk.

Appellant confuses the issue to an extent that is bewildering. On page 21 of its Brief, it says:

> "The audit was presented to and approved by the shareholders at their annual meeting. Then the Board allocated all or a substantial part of the profit of the Association to each of the departments, and those only, which showed a profit for the preceding fiscal year. This allocation was made in the proportion that the profit of each department bore to the profit of the Association as a whole (R. 374)."

This is not true—there never was an allocation of profits to departments which showed a profit. Using the same system of bookkeeping which had been used by its predecessor, the A.R.R.C., the Association audit segregated the operations of each department or unit and showed the profit or loss made by each.

Appellant continues on page 21:

> "The Association made payments to producers in cash (R. 362). Each producer who had sold agricultural products in a profit-making department would receive his share of the Association's profit allocated thereto in proportion that his dollar sales bore to the dollar sales of other producers to it (R. 351-352)."

The distribution of Association profits, whether called a dividend or "allocation" as above outlined, would have been absolutely contrary to law and the Articles of Incorporation.

On the other hand, the additional payments made to milk producers were made substantially in accordance with paragraph (7) of the Contract, and pro-rated on sales, as provided therein.

BY-LAWS.

The By-Laws of the defendant Association authorize the preparation of the Member's Standard Marketing Contract under which this action was brought. Section 3 of Article XII of the By-Laws is printed in full in Appellant's Brief on pages 42 and 43.

It provides that the member is bound to sell his agricultural products to or through the Association under such terms as the contract shall provide, including the following provision:

> "The Association to handle and sell such products singly or pooled and return to the member his net proceeds therefrom after deducting for expenses and Association obligations, including reserves and interest on shares of stock and other proper deductions have been made."

The foregoing quite clearly embraces the provisions of paragraph (7) of the Contract.

Section 5 (a) of Article XII of the By-Laws of the Association is as follows:

> "The principal monetary gain to a member through his selling activities is his share of the proceeds received from the final sale of his product after *proper deductions* are made for expenses and Association obligations above referred to. He may incidentally receive in addition dividends by the way of interest on his stock." (Italics ours).

It will be seen from reading these two sections that there is authority in the By-Laws for paragraph (7) of the Contract, but no provision for paragraph (8). That is, there is no authority granted to the Association to prepare or enter into a Member's Standard Marketing Contract containing any provision for buying produce from a member at a flat price. But, explicit authority is contained in the sections of the

By-Laws above quoted for the terms provided in paragraph (7).

The By-Laws, together with the Articles of Incorporation, were not printed in the record but are in evidence as Defendant's Exhibit No. II.

Now it is in evidence that commencing with 1941 and up to and including 1945, that is, for five successive years, the dairymen were made additional payments each year for their product of the preceding year.

There is no provision in the laws of Alaska, the Articles of Incorporation or the By-Laws under which these payments could have been made, except by virtue of the provisions of sections 3 and 5 of Article XII of the By-Laws of the Association and paragraph (7) of the Marketing Contract. These additional payments *were made,* as shown by the evidence. The By-Laws and Marketing Contract *do authorize them.*

The conclusion is irresistible that the additional payments were made in accordance with the provisions of paragraph (7) of the Contract.

This conclusion is consistent with all the testimony in the case, the laws of Alaska, the Articles of Incorporation and By-Laws of the Association.

The contention of Appellant is consistent neither with the facts nor the law.

Section 36-3-8, A.C.L.A. 1949, heretofore quoted, requires the apportionment of the earnings of the Association by dividends at least once each year. The

defendant Association introduced in evidence several extracts from the minute books of the Association but there was no evidence introduced to show that any dividend on the earnings of the Association was ever declared. If any such dividend was declared, it certainly would have appeared in the minutes of the Board of Directors and would have been introduced in evidence.

OPERATING EXPENSES.

Under the terms of paragraph (7) of the Contract, the Association agrees to pay or cause to be paid to the producer the amount received for the resale of his product, less certain specified deductions.

Among the deductions authorized are,

> "(b) Reasonable charges for the services of receiving, handling and selling said agricultural products under paragraph (5) of this Contract."
>
> "(c) Operating and maintenance expenses."

As has been shown, the By-Laws of the Association provide for a Marketing Contract authorizing these deductions.

As testified by the witness Snodgrass, the Association took over the operation of the entire civic center or corporation set-up at Palmer in January, 1940.

Quoting from the testimony of Snodgrass (R. 358):

> "Now, from that time on it maintained approximately the same bookkeeping system as the corporation had originally, * * * —it has maintained

approximately the same bookkeeping system, which gives first the profit and loss of the Association and then the breakdown into departments to see where the operation is satisfactory or where it is not satisfactory."

The Reports of Audit for the operations of 1944 and 1945, Defendant's Exhibit No. 1 and Plaintiff's Exhibit No. 6, show that under the system of bookkeeping referred to by the witness Snodgrass, the "reasonable charges for the services of receiving, handling and selling, etc.", referred to in item (b) above, were carried on the books under the head of "Operating Expenses". These expenses included all expenses directly chargeable to each particular department (R. 267). In the Report of Audit of 1946 the operating expenses of the dairy-creamery department for 1945 is set at $83,807.54 (Plaintiff's Exhibit No. 6, page 18).

These expenses are itemized on page 21 of the same exhibit.

Unfortunately, the expenses of the dairy-creamery department are not segregated as between the dairy and the creamery, the old system of bookkeeping in use before the Association undertook the business of selling milk being still maintained.

INDIRECT OVERHEAD.

The deduction authorized in paragraph (7) of the Contract "(c) Operating and maintenance expenses"

is carried on the books and audits of the Association as "Indirect Overhead".

This includes all the general operating expenses of the Association as a whole, not including those directly charged to the different departments under the head of "Operating Expenses".

The Dairy-Creamery Department is charged with $45,121.31 as its proportion of the Indirect Overhead for the 1945 fiscal year (Plaintiff's Exhibit No. 3, R. 182).

The plaintiff did not restrict the "Indirect Overhead" to this amount, as stated on page 31 of Appellant's Brief. The plaintiff accepted the defendant's figures.

The Association did not deduct a flat 12.494 per cent of gross revenues in each department as its proportion of the indirect overhead, "regardless of sales or mark-up", as stated on page 32 of Appellant's Brief. The Association apportioned the Indirect Overhead in the proportion that the gross sales of each department bore to the total gross sales of the Association (Plaintiff's Exhibit No. 6, page 19). The total sales of the Association for 1945 amounted to $1,091,439.21. The total Indirect Overhead of the Association for 1945 was $128,653.39, or 11.787 per cent of the total sales. The percentage apportioned to each department would normally be 11.787 per cent of its total sales, but the produce department was charged on the basis of 5/12 of the year, or 4.912 per cent. The other 7/12 was prorated to the other seven departments which

increased the percentage of each to 12.494 per cent of its total sales (Plaintiff's Exhibit No. 6, page 19) (Testimony of Allyn, R. 315).

The Indirect Overhead for 1944 was apportioned on exactly the same basis (Defendant's Exhibit No. 1, page 19). In that year the total sales of the Association were $1,303,343.64 (Defendant's Exhibit No. 1, page 17); the total Indirect Overhead was $104,-720.57, or 8.04 per cent; the produce department being charged with only 5/12 of its normal proportion, the other 7/12 was prorated to the other departments, increasing the percentage of each to 9.25 per cent of its total sales.

The Operating Expenses of all the departments of the Association, for the year 1945 totalled the sum of $246,888.05. The total "Indirect Overhead" for 1945 was $128,653.39. The sum of these two items, $375,-541.44, constitutes all the running expenses of the Association as a whole for the year 1945 (R. 309-310).

Of the total operating expenses in 1945 the Dairy-Creamery was charged with $83,807.54, which is itemized in the Report of Audit for that year's operations (Plaintiff's Exhibit No. 6, page 21). Of the total Indirect Overhead the Dairy-Creamery was charged with $45,121.31, which was based upon the proportion of its total sales to the total sales of all departments. The sum of the operating expenses and indirect overhead charged to the Dairy-Creamery for 1945 was $128,928.85 or 34.59 per cent of all the running expenses of the entire Association.

$128,928.85 represents the total deductions made from the resale of the Dairy-Creamery products in 1945, under (b) and (c) of paragraph (7) of the Contract, which was drawn in conformity with sections 3 and 5(a) of Article XII of the By-Laws of the Association.

As stated before, the By-Laws provide for the Contract and prescribe its terms. Signing it is a condition of the producer's membership in the Association.

It was in use long before the Association succeeded to the ownership of the Co-Operative Plant.

Beginning with the year 1941 and for five successive years, the Association paid the dairymen according to the terms of the Contract as interpreted by the Association. In all these years the Association treated the additional payments made to dairymen for the previous year's production as a part of the purchase price of the milk.

We agree with the proposition stated in the last paragraph on page 32 of Appellant's Brief, as follows:

> "An interpretation of paragraph (7), as well as other provisions of the Contract, must be made in view of the long-established practice of the parties."

AMOUNT OF RECOVERY.

The following is a condensed comparative statement of the operations of the Dairy-Creamery Unit for the fiscal years 1945, 1944 and 1943. The figures are taken

from Plaintiff's Exhibits Nos. 3 and 4, and Defendant's Exhibit No. 1,, page 4.

Fiscal Year 1945

Dairy and Creamery

Sales	$361,145.56
Cost of Goods Sold	178,422.88
Gross Profit on Sales	$182,722.68
Expenses	
Operating Expenses	$ 83,807.54
Indirect Overhead	45,121.31
Total	$128,928.85
Net Profit from Operations	$53,793.83
Rent from Apts. in Dairy Bldg.	3,207.75
Departmental Earnings	$57,001.58

Fiscal Year 1944

Sales	$262,995.79
Cost of Goods Sold	129,729.54
Gross Profit on Sales	$133,266.25
Operating Expenses	$ 45,499.92
Indirect Overhead	24,333.97
(Total Expenses not in Exhibit)	$ 69,833.89
Net Earnings of Department	$ 63,432.36
Rents	3,528.67
Total Departmental Earnings	$ 66,961.03

Fiscal Year 1943

Sales	$246,629.95
Cost of Goods Sold	131,679.59
Gross Profit on Sales	$114,944.36
Operating Expenses	$ 42,780.21
Indirect Overhead	23,212.39
Total	$ 65,992.60
Net Profit from Operations	$ 48,951.76
Rent	3,713.37
Departmental Earnings	$ 52,665.13

As before stated, the plaintiffs have been compelled to rely upon the books, records and audits of the Association, to prove their case. These show that the Association made a profit from dairy-creamery resales of $53,793.83, in 1945. To this is added the sum of $3,207.75 received as rents from apartments in the Dairy Building.

These rents were also credited as part of the profits in 1944 and 1943. However, the Court disallowed the item of rents as not being a profit derived from the sale of milk. It might have been properly credited as an offset to operating expenses.

Under paragraph (7) of the Contract the Association contracted to pay the dairymen the total amount received on the resale of their milk, less certain deductions, including (b) "reasonable charges for receiving, handling and selling" and (c) "operating and maintenance expenses", the first designated in

the books as "Operating Expenses", the second as "Indirect Overhead."

Using its inherited system of bookkeeping the Association has kept a combination account of the receipts and disbursements of the Dairy-Creamery Department with no segregation or apportionment of the amounts properly charged or credited to each.

It was the duty of the Association to segregate the accounts of the dairy and creamery, where they could be segregated, and to apportion them on some fair basis where they could not be segregated with certainty.

At the trial the plaintiff sought vainly to ascertain from the testimony of the witness Allyn, the chief accountant and assistant general manager of the Association, the percentage of the profit of the Dairy-Creamery Department earned by the creamery in 1945.

Allyn was called as a witness on March 14, 1947, and at various times between that date and July 15, 1947, and was repeatedly requested to produce this information. He testified (R. 282-3) that on the basis of the calculations made for the year 1944 the Creamery earned $20,457.87 and the Dairy earned $36,543.71 in 1945; that the apportionment was made on the basis of the apportionment made in 1944 which was considered to be and was accepted by all the parties as a "fair and equitable distribution", that "of necessity it is arbitrary".

On July 15, 1947, the following proceedings were had at the trial:

> Mr. Davis. Your Honor, before proceeding, at the time we met last, Mr. Grigsby asked that certain figures from the original records be furnished to him. It has developed that it has been impossible to dig out those figures. The defendants have brought down the original records in question and they are in the court room available for examination by Mr. Grigsby or anybody that he may wish to have examine them. (R. 564-5).

Mr. Grisby declined to attempt to "dig out" what the expert accountant had found it impossible to "dig out" in four months.

Allyn then testified for the defendant as follows:

> A. * * * Subsequent to the last session of the court, when I had the opportunity to review this material again, it was called to my attention that the year 1944 and 1945 are not applicable and the arbitrary method used in 1944 could not be applied to 1945 because of the fact that you had no eggs handled through the department in '44, and eggs were a considerable part of your business in 1945. So, an arbitrary system wouldn't apply to the two years.
>
> Q. Now, Mr. Allyn, are the two years, 1944 and 1945, then, comparable in the breakdown between the Creamery Department and the Dairy Department? Can they be compared from the figures that are available?
>
> A. No, they can not.
>
> Q. And what, then, about this testimony you gave us? Is it valid testimony as to the break-

down between the two, or should that be disregarded?

A. From my standpoint, it should be disregarded.

Q. Is there any way you have been able to work out a relationship between the creamery and the dairy from the year 1945?

A. It has not been possible.

The Court. Between what?

The Witness. '44 and '45. (R. 566-7).

In computing the amount of the judgment to which plaintiff was entitled the trial Court deducted the two per cent of gross sales provided for in paragraph (7)(e) of the Contract, the Court stating that this deduction had not been made on the books. As the books did not segregate the sales of milk from the sales of other creamery products there was no basis provided for making this deduction. The Court made the deduction as favorably to the Association as the evidence justified (R. 591-2).

In 1944 the Association made a profit of $66,961.03 on Dairy-Creamery operations, on sales amounting to $262,995.79.

Using the arbitrary method of apportionment of these profits described by the witness Allyn (R. 283) the Association retained $18,943.42 thereof, as the Creamery's share of the profits. This was according to Allyn's testimony and arbitrary apportionment and resulted in the dairymen receiving additional payments for their milk, in two payments made in 1945, aggregating 41.125 per cent of their cash sales of 1944.

The $18,943.42 retained by the Association was used according to the testimony of Snodgrass, the manager, "to plug up different holes" where the Departments made a loss (R. 511). The dairymen had made no complaint of this apportionment as the cash advances plus the additional payments gave them an acceptable return for the milk sold. This was likewise true of all the previous years' operations.

But for the year 1945, the Association, having many more "holes to plug" kept all the profits, and decided that it had bought the milk at a flat price. The trial Court found against this contention and that the dairymen were entitled to a judgment for $28,700.60.

CONCLUSION.

The Appellee sued on a Marketing Contract of purchase and sales. There is nothing in this Contract which takes away from any producer any part of his right of free enterprise. The producers did not agree to share profits and losses with other producers nor to make themselves partners of the vegetable farmers, nor of each other.

There is nothing in the Contract which takes away the reward of the thrifty, industrious and competent producer or that compels him to share his profits with or assume the losses of the indolent and incompetent. He sells his product according to the terms of a Contract which is authorized by the By-Laws and which contemplates, as stated in the By-Laws, that

> "The principal direct monetary gains to a member through his selling activities is his share of the proceeds received from the final sale of his product after proper deductions were made for expenses and Association obligations."

In the Contract the Association established what it considered the "proper" deductions. The producer, who signed the Contract, agreed to them.

The defendant Association has organized certain industries and enterprises, which the plaintiff and others who signed the Marketing Contract have agreed to patronize as members and stockholders of the Association and as such part owners thereof it was to their interest to patronize them, as well as to the interests of the Association. There is nothing in this part of the Contract which has anything to do with the interpretation of those clauses of the Contract which pertain to this lawsuit.

In the Brief of Appellant it is repeatedly urged that the payment of their obligation will deplete the assets of the Association and defeat the entire purpose of the colonization project. This is not a defense to a just claim nor is the history of the project and the relation of the Association to the government any defense. Even if probable that payment would result in the failure of the project and the liquidation of its assets, the plaintiffs, as stockholders and as such part owners, would suffer in their just proportion without being called upon to donate their personal earnings to the ruin.

It is inevitable that a corporation which cannot pay its debts must fail.

The situation of the dairymen is to be considered. They have an investment. They bear all the expenses incident to maintaining and operating a dairy farm up to the delivery of the milk produced. Under the Contract the dairymen have paid more than one-third of all the running expenses, direct and indirect, of all the Departments of the Association.

Appellant contends that the Association is doomed to liquidation if its capital is depleted by payment of its debt.

The record shows that the Association would not have survived to the date of this lawsuit except for the profits made from the dairymen's sales, during the five years' operations.

What profit the dairymen themselves have made during this period is not in evidence. Undoubtedly they earned it. The judgment of the District Court should be affirmed.

Dated, Anchorage, Alaska,
February 9, 1951.

Respectfully submitted,
GEORGE B. GRIGSBY,
Attorney for Appellee.

NO. 12544

In The United States Court of Appeals
For the Ninth Circuit

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vs.

C. R. MONAGHAN, *Appellee.*

APPEAL FROM THE DISTRICT COURT,
TERRITORY OF ALASKA,
THIRD DIVISION

REPLY BRIEF OF APPELLANT

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INDEX

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APPEAL FROM THE DISTRICT COURT,
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REPLY BRIEF OF APPELLANT

At the opening of his argument, counsel for appellee advances the view that only a question of fact is presented by this appeal, namely whether the dairymen sold their milk under paragraph (7) or under paragraph (8) of the contract.

> "This Brief, therefore, will be limited to an analysis of the evidence in the case. It is not found necessary to seriously dispute any of the propositions of law advanced by Appellant, nor to determine whether or not they are sustained by the authorities cited" (Brief of Appellee, p. 6).

We submit that such is not the case. Essentially what

ERRATUM: In the Brief of Appellant the following corrections should be made: At page 3, first paragraph, fourth line, under "Statement of Case," change "Title 26" to "Title 36." Make same change at page 39, in fifth line from bottom of page.

is presented is a question of law, as stated in the opening Brief of Appellant. This pertains to the interpretation of the Member's Standard Marketing Contract, taken as a whole, with respect to the facts presented.

Let us, then, refer very briefly to the Brief of Appellee and determine what answer is made with respect to each of the points heretofore presented by appellant in its Argument.

1. Appellee's Interpretation of the Contract Would Completely Defeat Its Purpose.

At pages 11 to 16 of the Brief of Appellant are summarized briefly the provisions of the contract in question. It is urged that all these provisions should be construed together to effectuate the purpose of the contract. The marketing contract, we suggested, would be converted into a mutual suicide pact if interpreted in such a way as to require the Association to drain off all profit in each department that showed a gain, retaining the losses only (R. 376). There were losses in some departments each year, it will be recalled, from the commencement of operation (R. 353).

In the Brief of Appellee the important point is evaded that its interpretation of the contract would have foredoomed the Association to failure years ago; that its notion of Association survival and paying out all profit in each profit-making department is self-contradictory. Counsel does state:

> "In the brief of appellant it is repeatedly urged that the payment of their obligation will deplete the assets of the association and defeat the entire

purpose of the colonization project. This is not a defense to a just claim nor is the history of the project and the relations of the association to the government any defense. Even if probable that payment would result in the failure of the project and the liquidation of its assets, the plaintiffs, as stockholders and as such part owners, would suffer in their just proportion without being called upon to donate their personal earnings to the ruin.

"It is inevitable that a corporation which cannot pay its debts must fail." (pp. 48-49).

However, this begs the question as to the nature of the "just claim" of plaintiffs. This is not simply a case of the Association's incurring or paying a debt. What is involved in the interpretation of the contract is a point so vital that it goes to the heart of the Association's organization and method of doing business.

2. Appellee Agrees With Appellant's Proposition That the Interpretation of the Contract Under Long-Established Practice of the Parties Is to be Given Great If Not Controlling Consideration.

At page 29 of Brief of Appellee, counsel, after setting forth the foregoing heading as entered in the Brief of Appellant (pp. 16-19), states simply:

"With this we agree." (Brief of Appellee, p. 29).

However, appellee promptly proceeds, again, to disregard the point involved by making no serious effort to find out what that long-established practice was *with respect to the question presented by this appeal.*

3. The Long-Established Procedure, Controlled by the Dairymen, Was for the Association to Distribute or Credit Any Profit It Made Back to Those Shareholders Who Sold Products to or Purchased Them from the Association In Profit-Making Departments.

The central point of difference between the parties thus narrows down to the subject matter considered under the above heading at pages 19 to 23 of the Brief of Appellant, which, of course, is supplemented by the material contained in succeeding headings of that brief.

After setting forth briefly the testimony covering prior practice with respect to distribution of earnings (Brief of Appellant, pp. 19 to 21) we stated:

> "Counsel for appellee may be challenged to point out any place in the record where any witness with direct knowledge of the Association's accounting or practice testified otherwise than in accordance with the foregoing." (Brief of Appellant, p. 21).

We submit that appellee has entirely failed to produce such testimony.

This is apparent from the "Review of Testimony," at pages 6-16 of the Brief of Appellee. Several points may be noted in this connection:

(a) The only witness referred to therein who had direct knowledge of the Association's established method of making payments to the dairymen is Mr. Snodgrass. Appellee sets forth three pages of his testimony. What counsel asked repeatedly of the witness was, whether the dairymen sold their milk at a flat "ultimate price." Mindful of the fact that whenever the Association had a profit it made payments in addi-

tion to the regular bi-weekly ones, Mr. Snodgrass, of course, phrased his answers in such a manner as to recognize the right of dairymen, as well as other shareholders, to secure a further, annual payment whenever funds for that purpose were available in the form of Association profit. In setting forth the testimony, appellee omitted, without designating the omission by asterisks or otherwise, the following statements of Mr. Snodgrass. This omission occurs in the record immediately after the sentence "A. That is what we have tried to follow," being the seventh line from the bottom of page 9 of the Brief of Appellee:

"Q. Then when you talk about finding yourselves with a profit at the end of the year and trying to redistribute that back to the people that contributed to it the most, you mean that you paid back the men that appear to have made a profit according to the profit they made? Is that really what you mean?

A. According to the profit the Association has made.

Q. According to the profit the unit—the dairy-creamery made, you fixed the final price of their milk?

A. No, according to that percentage of profit which that unit bore to the total profits.

Q. But you just stated you paid them off according to that Paragraph (7) as nearly as you could?

A. As near as we could and that was a considerable difference.

Q. According to your financial ability?

A. No, according to the distribution profits of the Association.

Q. Well, according to these figures the dairy-

creamery unit makes a profit of $57,000. Then you consider that a profit of the Association.

A. Well—

Q. Do you, or do you—

A. No, that might not be any profit at all to the Association.

Q. Now, this Paragraph (7) provides that you pay these men all you get for their milk after deducting anything you have advanced them, and after deducting.

A. Well, I know what it says". (R. 374-375).

Appellee disregards the testimony of Mr. Snodgrass elsewhere, in which he reiterates again and again that it is the profit of the Association that is distributed to producers each year (R. 352-354, 360-362; 365; 370-378; 453; 456; 470-490). Just a few lines further on in the record than the testimony quoted extensively by Appellee is the following:

"Q. What is it that has prevented you from paying them off entirely according to Paragraph (7) and not as near as you could?

A. Now, we are getting back—can I answer it at length?

Q. I hope it won't be too long.

THE COURT: Go ahead.

THE WITNESS: When the Association took over the operation it had both losing and profit-making unit—it had both losing and profit-making units, and the existence of losing units would not permit at any time the Association to distribute all its profits based upon just the departmental earnings because in that case, supposing that it had five units which made $10,000 and five units which lost $10,000, it would break even. But suppose it paid

out those five figures in black when its net profit or or loss shows zero, it would liquidate itself at the rate of $50,000 a year, which is a physical impossibility."

* * *

"Q. And you say since 1940 you have never purchased it under any other provision than Paragraph (7)?

A. No, I didn't say that". (R. 375-377).

(b) Appellee refers to testimony of other witnesses to the effect that they received bi-weekly payments accompanied with slips. We have covered this matter in our opening brief, and there is no dispute about that. The question presented by this appeal does not relate to these payments, but rather to the determination of the final, annual settlement when made.

(c) Appellee refers to no testimony given by any witness having direct knowledge on this point. On cross-examination the plaintiff Mr. Monaghan testified:

"Q. Do you know, Mr. Monaghan, what figures were used and how you arrived at the end figure, $3285.04, as being the amount you claim to be due to you?

A. I figured, prorated on the amount of milk I sold, on an equal share.

Q. Yes, now prorated against what? Mr. Monaghan, these slips you have shown the Court show that you were paid a certain percentage, I believe you testified, of the money you had already received that year. Now, is that the way you arrived at these figures, for the year 1945?

A. It would be on that basis, yes. Whatever is the share of the profit from the creamery prorated would be my share.

Q. All right, I think maybe you are getting somewhere now. On the profit of the creamery prorated according to some share?

MR. GRIGSBY: Mr. Davis, I might save you time to say I made the computations and he don't know anything of how I made it". (R. 237).

Elsewhere Mr. Monaghan testified that his source of information was reports rendered by the Association at its annual and special meetings (R. 239-240).

At page 21 of the Brief of Appellee it is stated:

"The witness McAllister thoroughly explained, both on direct and cross-examination, that the bimonthly payments for milk delivered were advance payments. The prices adopted were advance prices, for the milk delivered" (R. 174-176; 190-192; 209-212).

This is what Mr. McAllister testified on the point at hand:

"Q. Now, in '42, '43 and '44, of those fiscal years did you receive additional payments over and above the payments advanced?

A. I did.

Q. After the books were audited, is that right?

A. Yes.

Q. And did they ever furnish you a statement of the deductions which fixed the final payment, or did you have access to the books to see that, or was it explained?

A. It was explained. We had access to the books, but I never took advantage of it.

Q. Who was the manager during those years?

A. Well, there were three, I believe. There was Mr. Stock, and Mr. Snodgrass, and then—of course, that was this year—I guess there was just two." (R. 176-177).

Mr. Quarnstrom, one of the other assignors who testified, threw no light on the point. As a matter of fact, he indicated that the dairymen in his view were entitled only to "a large percentage" of the $57,001.85 shown as profit in the creamery-dairy department, upon some basis of reckoning not disclosed (R. 411).

Mr. Cope, another assignor, used the word "dividend" in his testimony, a word which counsel for appellee would avoid. There is nothing in his testimony inconsistent with the explanation of what was done as set forth in the Brief of Appellant (R. 438-439).

At page 13, appellee refers to a conversation which Mr. Rempel, one of the other assignors, had with Mr. Snodgrass in 1944, in which Mr. Snodgrass is reported to have said that "profit, on the milk" is divided at the end of the year (R. 388). Such a conversation throws little light on the point at hand, being vague at best and subject to the vagaries of the witnesses' memory.

(d) The appellee carefully avoids any reference to two other witnesses besides Mr. Snodgrass, the only others who did have direct knowledge on the matter at hand: Mr. Stock, the manager for the Association, who established the system of payments and distribution (R. 573-576), and Mr. Allyn, the accountant and assistant general manager (R. 265-267). Since their testimony clearly supports appellant herein, the appellee ignores it.

(e) Reference is made by appellee to a meeting, not of the board of directors, but "just an informal meeting" (R. 197-198), at which the statement is attributed to "either Virg Eckert or Mr. Stock" (R. 198) to

the effect that the Association was morally obligated to pay the $57,001.85. Mr. Stock explained this as follows:

> "Q. Now, Mr. Stock, is there anything else that you can add to clarify to the Court some of these matters that I haven't asked you about?
>
> A. Only in the set-up there we have a unique organization. In most cooperatives they are organized for one particular purpose, either to sell milk, to sell beans, to retail merchandise or to handle one commodity—eggs or butterfat or milk or whatever it might be. The very nature of the installation up there — they have various activities and, of course, they must be intermingled. It was set up originally with federal funds and then became the cooperative, making it possible for them to take over by borrowing federal funds. It immediately became an obligation upon all the Association, and when this question was first presented to the Board, of which I was a member, our attitude was that there was $2800 to distribute and we knew of no legal or any other obligation that would permit us to segregate one unit away from the other and distribute as overages anything other than the profits indicated by the Association as a whole. It was our belief, and we have been taught—I have been taught, in my business life—that it is not proper to distribute earnings out of anything except earnings. It cannot come out of capital, and that was my reason for my decision and the answer that I gave the boys at that time. While I sympathized with them, it was one of those things I could see no out on. If any other policy had been followed the Association would have been broke a long time ago." (R. 575-576).

(f) Reference is made, at page 15 of the Brief of

Appellee, to a stipulation made by counsel relating to evidence on payments. In order that there be no misunderstanding about this, we point out that the stipulation went no further than that the other assignors "would testify as Mr. Cope and Mr. Rempel and Mr. Quarnstrom have testified as to how their payments were made." As stated by Mr. Davis:

> "That stipulation will be something to the effect that they received payments bi-weekly, based on the amount of milk sold at such and such a fixed price, once again not saying the price was to be the final price, but on a fixed basis, and then at the end of each year received additional payments." (R. 442).

(g) At pages 16 to 20 of the Brief of Appellee, reference is made to the Association's Audits for 1944 (Defendant's Exhibit 1) and 1945 (Plaintiff's Exhibit VI) respectively, under the heading "Reports of Audit." Here, again, appellee discussed detail not pertinent to the question presented before us, namely, whether the practice of the Association was to pay out all profit credited on the books to the dairy-creamery department back to the dairymen irrespective of what the profit of the Association as a whole might be.

The matters of "indirect overhead," costs and operating expenses are covered at pages 31-33 of the Brief of Appellant.

We submit that the real question is, what was actually done, in substance and reality?

(h) Appellee took the position that the distribution made in accordance with the 1944 audit was satisfactory. Counsel for appellee asked his own witness, Mr. Rempel:

"Q. You were satisfied, were you, Mr. Rempel, with the way this matter was handled in 1944?

A. Yes." (R. 393)

Mr. Quarnstrom also so testified (R. 409).

Accordingly, the entire case for appellee collapses if the audit for 1944 shows that something less than the profit credited to the dairy-creamery department in fact was paid back to the dairymen.

This is clearly the fact. The profit credited to the dairy-creamery department in the 1944 audit was $66,961.03. The profit for the Association as a whole is given as $61,580.27, the difference between these two figures being represented by losses as to the "Fountain" and "Produce Department" (Def. Ex. 1, p. 3; R. 604). Now if appellee were correct in his view of what the prior practice of the Association was, he should be able to show that $66,961.03 was paid to the dairymen. However, the audit shows that only $47,416.19 was paid.

At the trial, counsel for appellee specifically examined witnesses on the point that over $18,000.00 credited on the books to the dairy-creamery department for 1944 had not been paid to the dairymen.

"Q. So that there was left remaining there to the credit of the net profits of the dairy-creamery for the year 1944 the sum of $18,943.42. Now you were manager at that time: do you know what use was made of that money?" (R. 447)

Mr. Snodgrass, to whom the question was directed, then explains in detail again the mechanics by which the Association distributed its surplus earnings (R. 447-456).

A little further on in the testimony, further questions are asked of Mr. Snodgrass as to how the money happened to be withheld from the dairymen in 1944.

> "MR. GRIGSBY: Referring back to that 18,000 and some odd dollars that was held out, or remained from the net profits of the creamery and dairy for the 1944 production, after paying additional payments of 20 per cent and 21.125, was there any agreement made with the dairy farmers that that amount should be held out, or was nothing said about it?
>
> A. I believe that there was nothing said about it.
>
> Q. They seemed to be satisfied? That's all.
>
> A. Well, it's altogether in a sort of negative sense. They have raised no objection and they always come in at the audit and see the figure is there. So it shows—
>
> Q. They have the legal privilege of coming in and seeing it?
>
> A. That's right.
>
> MR. GRIGSBY: That is all." (R. 520).

Finding himself at a complete loss to explain how the Association could have retained this money in 1944, appellee then suggested through his assignor Mr. Huntley that perhaps dishonest motives entered into the matter:

> "Q. Now, you have heard it testified to here today—a reference made, anyway—to some $18,000 odd retained by the co-op out of the net profits of '44 after making those additional payments? Did you hear that testimony?
>
> A. I did.
>
> Q. Did you know—when did you first know that they retained that?

A. Today.

Q. When you were paid off in '45—your final payment on what was called the milk pool of '44—did you assume, or did you know there was anything left of the net profits of the creamery-dairy?

A. I did not.

Q. What was your idea as to what had become of all the net profits?

A. I thought that all the net profits were being paid to the producers.

Q. And why did you think that?

A. It never occurred to me to question it.

Q. You mean you had confidence in their—

A. I did. I thought we were a group of honest individuals and that everything was above board." (R. 525-526).

All of which goes to show simply that the appellee was surprised to find that the 1944 audit discredits the theory which he strives to support.

This same audit contains a recapitulation of data for prior fiscal years and indicates that the prior practice each year was the same. Thus, page 16 is entitled "Undivided Profits" and shows the balance as of December 1 for each of the prior years 1939 through 1943.

The audits for 1945 and for 1944, respectively, were made by the same accounting firm, Neil, Clark and Company of Fairbanks, Alaska. Placing them side by side, one perceives that the same methods were used in each. It is apparent that the only real difference in result is that in 1944 the Association made a substantial profit while in 1945 it did not.

Without apparent realization of the observation,

counsel for appellee virtually concedes all that has been said, above, with respect to prior practice in distributing net earnings. Counsel stated:

> "The $18,943.42 retained by the Association was used according to the testimony of Snodgrass, the manager, 'to plug up different holes' where the Departments made a loss (R. 511). The dairymen had made no complaint of this apportionment as the cash advances plus the additional payments gave them an acceptable return for the milk sold. This was likewise true of all the previous years' operations.
>
> "But for the year 1945, the Association, having many more 'holes to plug' kept all the profits, and decided that it had bought the milk at a flat price. The trial Court found against this contention and that the dairymen were entitled to a judgment for $28,700.60." (Brief of Appellee, p. 47).

While the statement is correct that in 1945 the Association "kept all the profits" the fact should be recalled that it made only $2,889.27 in that year (Pl. Ex. VI, p. 2, R. 604).

4. Paragraph (7) of the Contract Does Not Determine The Question Presented By This Appeal.

Under this heading in the Brief of Appellant, four points designated (a) to (d) were listed (pp. 26-31).

Appellee disregards these points. but does attempt to avoid what was said there as to the untenable theory of "advances" by classifying the bi-monthly payments as "advance price." This phrase has no meaning unless it is, that it is a price paid before, or in advance of, the annual distribution of profit.

5. Even if Paragraph (7) Were Held To Govern, When Interpreted In The Light of The Practice of The Parties, It Would Support The Position of Appellant Herein.

What has been said above covers this point, which receives scant attention in the Brief of Appellee. As to this, as well as other points referred to, the underlying proposition must be accepted as a starting point, that it was the established practice of the Association to make its annual payments out of net profit of the Association. Once appellee concedes, as he has, that this practice governs the rights of the parties, the applicable paragraphs of the contract, whether deemed (7), (8), or otherwise, must be construed on that basis.

6. In Practice The Parties Applied Paragraph (8); The Bi-Monthly Payments Were Prices For Milk Delivered On Cash Sales and The Annual Payments Were Dividends Proportioned Upon Such Sales.

In the course of discussing paragraph (8) of the contract, appellee makes the following statement:

> "There is no testimony in the record that the dairymen were * * * at any time informed that they had been selling their milk at a flat price and that they had nothing coming." (Brief of Appellee, p. 26.)

This statement apparently assumes that notice would be necessary to a dairyman for the Association to invoke paragraph (8), but there is no provision therein requiring any such notice.

Appellee lays much store by the fact that the word "dividend" was not used. We have seen that the word

"overage" was. Whether used or not, it is, again, the substance of the transaction rather than verbiage that it important.

Appellee concedes that the products when delivered became the property of the Association:

> "It has been maintained by Appellant and is conceded by Appellee that from the time the Association went into the retail milk business in 1940 they purchased the dairymen's milk under the provisions of the Member's Standard Marketing Contract, and that, whether they purchased the milk under the provisions of paragraph (7) or paragraph (8) of the Contract, when delivered it became the property of the Association. When sold the proceeds of the sale became the property and assets of the Association." (Brief of Appellee, p. 28).

This being conceded, it is submitted that points (a) through (f) follow which are set forth in the Brief of Appellant under the same heading as that here being discussed (pp. 33-39).

The only point made by appellee in this connection apparently is, that pasteurization does not constitute a process within the meaning of paragraph (8) of the contract, providing for a flat delivery price as to such products as "it may process or manufacture . . . into changed or new products" (Brief of Appellee, p. 27). This disregards the definition of "process" in Webster's Dictionary, and the usage illustrated by authorities cited (Brief of Appellant, pp. 35-37). It may be noticed, moreover, that the processing of the milk involved not only pasteurizing but also testing, grading, standardizing and bottling.

7. Payment of The Amount Demanded Would Constitute A Payment Out of Capital In Violation of The Laws of Alaska, The Articles and By-Laws of The Corporation.

Appellee seems to agree with this proposition, discussed at pp. 39-44 in the Brief of Appellant, except that appellee repeats his contention that the payment is not a dividend. What has been said is sufficient on the point that in substance it is just that.

At pages 30 to 37, appellee in his brief urges that payments to dairymen could not be a dividend because Alaska Compiled Laws Annotated, 1949, Section 36-3-8, as well as the articles of incorporation and by-laws of the Association, contemplate that any dividend be "uniform" as to all shareholders. What the Association did, as we have seen, was to determine as far as possible the amount of profit made by it from each shareholder and return it to each as far as prudent business practice would permit. All shareholders were treated uniformly in this respect, the classification by departments being utilized simply as a guide to management and a convenient means of accomplishing this distribution. No case can be cited where either the law of Alaska or any comparable articles or by-laws were ever interpreted so rigidly as to invalidate this practice.

If appellee is correct, he has succeeded in proving that the dairymen in prior years had received more than they were entitled to. And any argument to the effect that paragraph (7) of the contract governs would be of little avail in any effort to make the annual payment legal under the law of Alaska simply by calling it something else than a dividend. If in substance that is

what it was, it would be legal or illegal irrespective of what the marketing contract said on the point.

In various parts of the Brief of Appellee criticism is directed at the method of doing business pursued by the Association. What is overlooked is, that it was the dairymen who were in majority control of the Association at all times (R. 491, 575). This was true even though they numbered only 27 to 29 out of a total membership of about 130 (R. 574-575). In any event, 1945 is an isolated year when a substantial profit was not made, as contrasted with heavy losses incurred when the operations were in the hands of the predecessor of the Association, the Alaska Rural Rehabilitation Corporation.

Appellee implies that the dairymen were penalized by having to subsidize losing departments. This had been the practice since the Association was chartered. To be noted is the fact that the dairymen did not confine their activities to dairying solely; some of them at least raised produce and other commodities which were marketed through departments that lost money. This was true, for example, of Mr. Quarnstrom (R. 415-416), Mr. Ising (R. 422) and Mr. Johnson (R. 424), assignors of plaintiff. In other ways, too, they received benefits from losing departments (R. 323-325). Further, the dairymen, if operating their department alone, would have a disproportionately high overhead, now distributed over the losing departments (R. 482).

The principal point to be noted is, that the dairymen received the benefit of the acquisition by the Association of the dairy-creamery plant at Anchorage. Each dairyman put up only the $5.00 required in the Stand-

ard Marketing Contract of all other producers. Yet, it was through this acquisition, and the establishment of direct-to-consumer sales that the creamery-dairy department was converted from a losing one at the start into the most profitable of all. This matter is covered at pages 22-23 of the Brief of Appellant.

Criticism is implied of Mr. Allyn, the accountant, for not having made a segregation of costs as between the creamery and dairy portions of the creamery-dairy department (Brief of Appellee, pp. 43-46). What has been said with respect to the dairymen controlling the business applies here, also. Furthermore, appellee called Mr. Allyn as his own witness when the latter had been in the employ of the cooperative for two months only (R. 248, 290). The appellee could have secured the auditor from Fairbanks who had made the regular annual audits in prior years, or invoked other pre-trial procedure to secure any information obtainable. In any case, the data is irrelevant to the issue presented by this appeal.

Respectfully submitted,

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No. 12,544

IN THE

United States Court of Appeals

For the Ninth Circuit

MATANUSKA VALLEY FARMERS COOPERATING ASSOCIATION (a corporation),
Appellant,

vs.

C. R. MONAGHAN,
Appellee.

APPELLEE'S PETITION FOR A REHEARING.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

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Appellee.

APPELLEE'S PETITION FOR A REHEARING.

To the Honorable William Denman, Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

The above named appellee, C. R. Monaghan, presents this his Petition for Rehearing in said cause, and in support thereof respectfully represents:

I.

COUNSEL FOR APPELLEE HAD NO OPPORTUNITY TO ARGUE THE POINTS ON WHICH THE DECISION OF THE APPELLATE COURT WAS BASED.

The decision of the appellate court is based upon the theory of the case which was suggested neither in

pleadings, the testimony in support thereof, the briefs on appeal nor in the oral argument upon the appeal. Consequently the counsel for appellee was afforded no opportunity to present an argument in opposition to the conclusions arrived at and expressed in the opinion of the appellate court.

Lest this last statement may to the court seem unwarranted and not in accordance with the recollection of the judges who heard the argument and therefore create an unfavorable impression at the outset, may it be conceded that the presiding judge did quite clearly indicate by his questions to counsel his opinion that under the terms of the contract the dairymen were to receive supplemental payments for their milk, in addition to the flat payments made to them periodically, when, and only when, the Cooperative made a profit for the year. However, the presiding judge did not indicate that he inclined to this view because, as stated in the opinion, "the parties chose to abandon the Contract as written and act under a modification thereof." It is the last quoted statement, and other similar statements contained in the opinion of the appellate court which the writer asserts he had no opportunity to discuss or combat and which he is confident can be shown on further argument to be unsupported by any evidence in the case.

II.

FINDINGS OF FACT.

This case was tried before the court, a jury having been waived. The Findings of Fact were to the effect that plaintiff and his assignors sold their milk to the defendant in accordance with the provisions of paragraphs (6) and (7) of the Member's Standard Marketing Contract and not otherwise. (R. 126.) If there was substantial evidence to support these Findings, they should not be disturbed.

III.

THE MERITS OF THE CASE.

It is evident that in arriving at the conclusions expressed in the last two pages of its opinion, the appellate court labored under a false impression not only as to the facts of the case, but as to its moral and equitable aspects. The writer is confident that the argument in support of this petition will dispel that impression, at least to the extent of showing reasonable grounds for a rehearing.

IV.

STATUS OF THE CASE.

On December 29, 1947, the trial court rendered judgment for the appellee, hereinafter designated as plaintiff, and against the appellant, hereinafter designated

as defendant, for the sum of $31,245.34, with interest and costs.

Thereafter execution was issued on this judgment, the proceeds of levies made thereunder applied to the satisfaction thereof, and paid to the plaintiff by order of the trial judge dated March 10, 1948. (R. 131-133.)

Thereafter, on March 25, 1948, the defendant filed its Petition for Allowance of Appeal. (R. 133-134.) The appeal was allowed on March 26, 1948. (R. 142.) The judgment was reversed by the appellate court on April 26, 1951.

V.

THE ISSUES RAISED BY THE PLEADINGS.

The complaint alleged that the plaintiff sold his milk product to the defendant under the terms of a written contract called the Member's Standard Marketing Contract. (R. 2-3, par. II.) This allegation is admitted by the Answer. (R. 73, par. I.) The complaint further alleges that the defendant promised to pay for the milk so sold by the plaintiff according to the provisions of paragraphs (6) and (7) of the contract. This allegation is denied in the answer. (R. 74, par. III.)

The answer further affirmatively alleges that the milk sold by plaintiff to defendant was purchased by the defendant at a fixed price per hundred pounds, and that "after making the deductions authorized by paragraphs (7), (8) and (12) of the Marketing Agree-

ment, the plaintiff has been fully paid by the defendant for all milk sold and delivered to the defendant by the plaintiff." (R. 74, par. I and II.) Thus it is alleged and admitted in the pleadings that the plaintiff sold his milk to the defendant under the terms of the written contract and there is no suggestion of any modification thereof in the pleadings.

VI.

THE EVIDENCE.

The testimony on the part of the defendant was to a considerable extent devoted to attempting to establish that the milk sold and delivered by plaintiff to defendant was sold at a flat price under the provisions of paragraph (8) of the Contract.

There was also a nebulous theory advanced by some of defendant's witnesses that the payments for milk made subsequent to the periodical flat payments were dividends allocated to those units which made money for the Association. The appellate court disposed of these contentions adversely to the defendant and without much comment.

Both these contentions were revived in appellant's brief and in the oral argument, but there was no suggestion in either the testimony, the brief or the argument that there had been a modification of the written contract. We repeat, that the first suggestion of such a modification was made in the opinion of the appellate court.

VII.

ARGUMENT.

It is considered unnecessary to set forth the opinion of the appellate court in full. Only such portions will be quoted as are deemed especially pertinent.

On page 2 of the opinion the court states:

> "The trial court decided the case on what it deemed to be the requirements of the written contract. We think that contract was, subsequent to its execution, modified by the acts of the parties and by mutual consent."

It seems to be conceded in the quoted statement that the requirements of the written contract, as executed, were correctly interpreted by the trial court.

FINDINGS OF FACT.

The first paragraph of Finding of Fact V was as follows:

> "That during the period beginning December 1st, 1944, and ending November 30th, 1945, the plaintiff and his assignors sold and delivered to defendant 1,082,128 pounds of Grade A milk, and 176,986 pounds of Grade B milk for which defendant promised and agreed to pay plaintiff and his said assignors, according to the provisions of paragraphs (6) and (7) of the said contract, that is to say an amount representing plaintiff's interest and the interest of plaintiff's assignors in all milk and milk product resold by defendant

with which plaintiff's milk was pooled and commingled, and the proceeds thereof, after making deductions to cover the items mentioned and stated in paragraph (7) of the said contract."

Whether or not the contract was modified "by the acts of the parties and by mutual consent" is, of course, a question of fact.

The appellant made proposed Findings of Fact (R. 138-140) but in none of them suggested that the contract was modified subsequent to its execution.

It certainly is remarkable that if there was any substantial evidence in support of the theory that the contract was modified it should have entirely escaped the notice of counsel for appellant, both at the trial, in appellant's brief and also in the oral argument on the appeal.

Throughout the entire proceedings the contention of the appellant as to the meaning of the contract has been that the contract meant, when executed, what the appellate court now says it means as modified by the acts of the parties and by mutual consent.

EVIDENCE IN SUPPORT OF FINDINGS OF THE TRIAL JUDGE.

The appellate court summarizes the evidence in support of the Findings of the Trial Court, heretofore quoted, as follows:

"The District Court concluded that Paragraph 7 was applicable and relied on the testimony of certain of the dairymen that they understood

they were to be paid in accordance with Paragraph 7; also, the testimony of at least one of the former officers of the Cooperative that the Cooperative had endeavored to follow Paragraph 7 as closely as possible. The District Court adopted the accounts of the Cooperative (prepared for the purpose of allocating the net profit of the Cooperative, as hereinafter shown), to reflect the income and deductions attributable to the Dairy-Creamery Department under Paragraph 7. Thus the dairymen were considered entitled to the entire book profit credited to the Dairy-Creamery Department ($53,793.83) for '45, although the net profits of the Cooperative were $2,889.27."

The appellate court then proceeds as follows:

"We need not decide whether this accounting system satisfies the provisions of Paragraph 7 because the parties chose to abandon the contract as written and act under a modification thereof. It is not disputed that the Cooperative has at no time paid the dairymen in accordance with the provisions of Paragraph 7. It has made no effort to return to the dairymen in accordance with that paragraph, the proceeds fairly attributable to the milk sold by them to the Cooperative less appropriate attributable deductions."

We submit that the last quoted statements of the appellate court are not supported by any evidence in the case, which will be demonstrated by the argument on this petition.

We also submit that the appellate court has not stated all the evidence in support of the Findings of the District Court.

In the first place, there is the contract itself, under the terms of which the dairymen were to be paid according to the profit made on milk without regard to the profits of the Association as a whole.

In addition to this, it will be demonstrated that ever since the Association went into the milk business to any extent, which was in 1940, the additional payments made to the dairymen were based upon the profit made upon the sale of their milk after the deductions specified in the contract had been made, without any regard whatever to what the Association made as a whole.

In 1945 the dairymen were made two additional payments for their sales of milk during the fiscal year ending November 30, 1944. These payments aggregated $45,919.20 (Plaintiff's Ex. 6, page 16), which represented one payment of 20% of the total amount advanced on delivery of milk and one of 21.125% of the total amount so advanced. This percentage system was the simplest method that could be devised for apportioning to each producer his proportionate share of the profits, as required by paragraph (7) of the Contract.

Some confusion exists on account of the fact that the dairy and creamery are carried on the books as a single department. The dairy was purely a producers' unit while the creamery was almost entirely a consumers' unit, although it used a small portion of the dairymen's milk and bought and resold eggs produced by the farmer.

As the dairy and creamery used two buildings in common and employed some of the same labor, their operation expenses and indirect overhead were difficult to segregate.

For the fiscal year ending November 30, 1944, the net profit from the dairy-creamery operations, not counting rents, was $63,432.36. (Def. Ex. 1, page 19.)

This was after the deductions specified in the contract, as stated on page 3 of the opinion of the appellate court. Of this profit of $63,432.36, as stated before, the dairymen were made additional payments aggregating $45,919.30. The balance was retained as claimed creamery profits. The basis of this division of profits was never explained.

An attempt to do so was made by the witness Marvin Allyn, the Chief Accountant and Assistant General Manager of the Association, a perfectly honest witness. His testimony was voluminous and worth quoting in its entirety, if space permitted. However, the court is earnestly urged to read that portion beginning on page 281 and ending on page 285.

Allyn was a qualified witness. He majored in agriculture, did seminar work in cooperative marketing, was for a short period with the Farm Credit Administration and was in the employment of the Whatcom County Dairyman's Association from 1937, to January, 1947, except for a period of military service.

Allyn went into court prepared to show that the Creamery Branch of the Dairy-Creamery Department

was entitled to be credited with some portion of the entire book profit credited to the Dairy-Creamery Department ($53,793.83) for the year 1945. He was equipped with figures for that purpose. At no place in his testimony, which fills over 100 pages of the transcript, is there any suggestion that the dairymen were not entitled to be paid in accordance with the terms of the written contract.

After being questioned as to the proper division of the 1945 profit, on pages 282 to 284 of the Transcript of Record, Allyn testified as follows:

On Direct Examination

Q. Yes. All right, now then the proportion of profit: How was that arrived at? Was that in proportion to the proportion of sales?

A. In the same proportion.

Q. So, you figured the profit must have been in proportion to the sales?

A. That is right.

Q. That wouldn't necessarily be so, would it?

A. No. It must be—it was acceptable arbitrary formula.

Q. Well, so far as you know from everything you have here you don't know that the creamery made any money in 1945, do you?

A. Or the dairy—we know that together—

Q. Together they made $57,000?

A. Yes.

Q. But you don't know what part of that the creamery earned?

A. No.

Q. Nor that it earned any part of it?

A. That's right.

Q. This year they have started a new system down there so as to a year from now you will probably be able to give those figures on it?

A. That is right.

Q. You have inaugurated that new system yourself?

A. That is right.

Q. Because they had no system before that of segregating that proportion?

A. That is right. (R. 284-285.)

Now, in the spring of 1946, after the audit of the operations of the fiscal year ending November 30, 1945, the dairymen were informed that they could expect no additional payments for the 1945 sales.

The testimony is contradictory as to the reasons given by members of the Board of Directors to representatives of the dairymen for this situation.

Some of the dairymen testified that they were told in effect that they were entitled to the money, but that there was nothing to pay them with. The defendant's witness Stock, a former manager, testified that he had been taught in his business life that it is not proper to distribute earnings out of anything but earnings. That "it cannot come out of capital, and that was my reason for my decision and the answer I gave the boys at that time."

The dairymen were not furnished with a statement of their share of the book profit of the Creamery-Dairy Department, and never have been, because, as testified by Allyn, the Association had no system for segregating that proportion. He attempted to do so at

the trial by following the system which was applied for 1944, but finally gave it up, and testified as follows:

> Q. Now, Mr. Allyn, are the two years, 1944 and 1945, then, comparable in the breakdown between the Creamery Department and the Dairy Department? Can they be compared from the figures that are available?
>
> A. No they can not.
>
> Q. And what, then, about this testimony you gave us? Is it valid testimony as to the breakdown between the two, or should that be disregarded?
>
> A. From my standpoint it should be disregarded. (R. 566.)

The dairymen, Monaghan and his assignors, being afforded no information as to their share of the profits of 1945, because the association did not have it, brought suit for their share of the whole of the book profits of the Dairy-Creamery Department for the year 1945.

Their counsel, at least, fully expected that the defense would establish that the Creamery had earned some of this profit but under the circumstances the plaintiff had no other recourse than to sue for it all. The defense, as shown by Allyn's testimony, made an attempt to establish the Creamery's share, but failed and it was finally developed from the testimony, as found by the trial judge, that the Creamery made no part of the profit.

This was not surprising, as the association made losses in nearly all their other departments in 1945,

heavier losses than they had ever made before, of which we have any record. Their losses aggregated $54,113.31. This was under the management of Snodgrass, the man who first testified that the dairymen were not to be paid additional payments, unless the Co-Op made a profit as a whole.

This court has in its opinion adopted that theory, but by virtue of its view that the contract was modified.

We respectfully ask the court to carefully consider the necessary effect of its decision.

The Produce Department lost $9,631.04 in 1943, and $3,899.28 in 1944. (Defendant's Ex. I, page 3.)

It lost $20,319.12 in 1945. (Plaintiff's Ex. 6, page 19.)

It lost $30,359.12 in 1946. (Plaintiff's Ex. 3.)

The record does not show what the Produce Department made or lost in the prior years. The dairymen were not affected as they received additional payments every year after the association went into the business of selling fluid milk, as their profit from the previous year's operations.

The appellate court attaches some importance to the fact that these losses were not carried over from year to year, and that no effort was made to recover the amount of the loss from the producer. (Opinion, page 5.)

In other words, that the obligation was apparently cancelled.

A court action would necessitate a hundred or more separate suits. And judging from the results of the association's operations as shown above, in the other departments, the farmers might successfully defend on the ground of mismanagement.

To carry the account over would leave them perpetually in debt.

But evidently the association decided, "Why bother about it? We will take it out of the profits of the dairymen." Which is exactly what they did, and exactly what this court has held they had a right to do. This court has held that there is evidence in the case to the effect that the dairymen, by acquiescence or otherwise, agreed to absorb all the losses of all the departments before being entitled to any profit on their milk.

The By-Laws provide that proper deductions may be made for expenses and association obligations. (Sec. 5, By-Laws.)

These losses were not expenses, nor obligations, of the association.

Until this suit was brought the association never contemplated that the dairymen should absorb the losses of the Produce Department.

We submit the testimony of Marvin Allyn, who came to court prepared to establish the Creamery share of the Creamery-Dairy profits.

> Q. Now, do you know, having overpaid the farmers for '45, the sum of $20,319.12, is that now charged against those farmers?

A. No.

Q. Is that an indebtedness cancelled? How do they adjust that?

A. That is absorbed by the Association.

Q. Is that absorbed by this $57,000.00 profit?

A. *No, it is absorbed by the Association as a whole.*

Here is the testimony of the Chief Accountant and Assistant Manager of the Association and a man of vast experience with cooperative associations. It supports the Findings of the trial court.

Is it not reasonable that the losses made by the Association as a whole (the losses in each department were made by the Association as a whole no matter what employees conducted the operations) should be absorbed by the Association as a whole?

With due respect to the court we suggest that its decision leaves the dairyman producer in an impossible situation. He is confronted with the proposition that he must absorb the net loss of all the departments, and of any additional enterprises that the association may choose to embark upon, before he can expect a profit.

To require this, or to require the produce farmer to labor under an indebtedness on account of a loss made in the Produce Department, would not be consonant with the purposes of the Association as expressed in paragraph (18) of the contract.

"(18) In view of the common purpose of the Association and the Alaska Rural Rehabilitation Corporation as set forth on page 1 of this Con-

tract in promoting gainful agricultural activities on the land and allied activities on the part of members of this Association and the Association's obligations to coordinate its efforts for the same objective with those of said Corporation as provided for in the Articles of Incorporation and By-laws of the Association the Producer agrees that while occupying a home financed by said Corporation on government or other land or while occupying homes on patented land under contract of land and home purchase from said Corporation or otherwise he will abide by all rules and regulations of said Corporation concerning the use of said lands for agricultural purposes." (R. 69.)

The witness Marvin Allyn has testified, as hereinbefore quoted, that these losses in the Produce Department were absorbed by the Association as a whole, that they are not absorbed by the Dairy-Creamery profits, that they are not still owing, in other words, that they are written off. He was testifying with respect to the $20,319.12 loss in 1945. The same would be true with respect to the other years.

It seems reasonable that the association as a whole should absorb these losses since the association as a whole made the losses.

The dairymen, as part owners of the association, would necessarily suffer their proportionate share of the loss, not all of it. Under the appellate court's decision, the dairymen suffer the entire loss. The vegetable producer, who benefited to the extent of $20,319.12, suffers none of it.

expenses, indirect overhead, cost of goods sold, etc. The evidence indicates that it had nothing to do with the profits of the association as a whole, which were considerably less, in fact $55,606.15. It was 100% of the Dairy-Creamery profits. In 1943 the Dairy-Creamery netted $48,951. With rents, $52,665.13. The association suffered slight losses, so that the net profits as a whole were greater than the Dairy-Creamery profits. The Dairy-Creamery was again credited on the books with 100% of its profits, regardless of the association profits, and an arbitrary apportionment made to the dairymen, which was accepted by them without protest.

It is not contended that any dairymen were ever told that he would not be paid according to the contract, that he would have to absorb the losses of other departments.

It cannot be contended that the dairymen's acceptance of a profit when the association made a profit as a whole, is evidence of an agreement to waive the contract, when the association as a whole did not make money. If in one single year there had been such a waiver, that would be some evidence in support of the court's decision.

The closing statement in the court's opinion is as follows:

> "The appellee should not be permitted to modify the contract when it is to his benefit to do so and then reinstate it and insist upon strict performance when that position would benefit him most. We think that is what he is attempting to do here."

The appellee has never attempted to modify the contract. He maintains that he sold his milk under the terms of the original contract at all times. If the court means that the dairymen benefited at any time by measuring their profits by the profits of the Association as a whole the court is simply mistaken. Their profits have never been affected to the extent of a single dollar by the profits of the Association as a whole. They have always been measured, as is clearly shown by the audits, by the profits of the Dairy-Creamery Department, which the dairymen assumed and had a right to assume, were divided fairly between the Creamery and the Dairymen. There never has been any "exaggeration" of the profits of the dairymen, as stated on the last page of the court's opinion.

DEPRECIATION.

On page 7 of the opinion, the court also states that one of the principal factors in converting the Dairy Department from a losing to a profitable enterprise was the construction of the Dairy-Creamery plant at Anchorage. That the cost of this apparently was not allocated to the Dairy Department. That this method of bookkeeping tends to exaggerate the amount of "profits" attributable to the dairy products. The court is apparently mistaken about this.

This court has recently decided a case in which a question involving the rent on the lot on which this Dairy-Creamery plant was built. The association has a lease on the lot, now expiring in five years. The association built this plant on borrowed money.

Each year the depreciation has been charged to the Dairy-Creamery Department. It has been charged to the Dairy-Creamery as an operating expense. The operating expense of the Creamery and Dairy for 1944 are listed on page 23 of Defendant's Exhibit I.

The depreciation charged to the Creamery-Dairy for that year is $7,966.40. The total depreciation of all of the association property is $22,264.00. The Dairy-Creamery pays over one-third. Of course that depreciation includes the Palmer Creamery, for the latter is listed nowhere else.

The depreciation charged to the Dairy-Creamery Department for 1945 was $8,422.21, the total depreciation for that year was $25,434.55. (Plaintiff's Ex. 6, page 21.) Again the Creamery-Dairy pays more than one-third of the total. And, may it please the court, this depreciation is paid in cash, and withheld by the association from the gross receipts of the Dairy-Creamery sales, and, as the record shows, mostly from the milk sales. The operation expenses of the Dairy-Creamery in the same exhibit total $83,807.54. The total operating expenses of the entire association are $246,888.05. Again the Creamery-Dairy pays more than a third. The Indirect Overhead charged to the Creamery-Dairy for 1945, was $45,121.31, the total Indirect Overhead was $128,653.39.

More than 35%. And far the greater part of all these totals came out of the Dairy profits, as the Creamery made little, if any, profit in 1945.

The opinion states that the dairymen were aware that the Cooperative was organized to remain in busi-

ness, not to "bleed itself out of existence". May we state that the figures show that the dairymen have kept the Cooperative alive ever since the dairy plant was built. Before that the Creamery was "heavily in the red" according to the witness Stock. The dairymen should not be penalized because the Cooperative had a bad year.

We stated early in this petition, that we believed the appellate court labored under a false impression as to the moral and equitable aspects of this case. That was stated because the last page of the court's opinion seemed to indicate the view that the dairyman was "out for his pound of flesh". If the attitude of the dairymen in this case seemed to the court unconscionable or grasping to the extent of affecting the court's decision, then it seems proper to state, that it could be proved, if relevant, that the home-owners referred to in paragraph (18) of the contract above quoted, particularly the dairymen, are still heavily in debt on the purchase price of their homes, some to the extent of several thousand dollars; that the average dairyman, while he makes a greater gross income, makes a less net income than the produce farmer. This is because for nearly seven months in the year, the produce farmer can supplement his income by working at high wages for Army contractors, for the Alaska Road Commission and in other employment, while the dairymen must stay at home the entire year in order to care for, feed and milk his cows. These facts can be proved by government reports on the Matanuska Valley farm situation.

The Findings of the trial court are further supported by the testimony of several of the dairymen to the effect that at a dairy meeting when Stock was manager (Stock retired as manager in 1943) there was a discussion over the question of cutting the advance price of milk and Stock told the dairymen that he couldn't see any objection to cutting the price, because all the money over the operating cost would come back to the dairymen.

McAllister testified substantially as above stated. (R. 201.) He was corroborated by several other dairymen. By Arvid Johnson. (R. 425.) By Aaron Rempel who testified that he came to Palmer in February, 1944, brought nine cows with him and started delivering milk in March. That Snodgrass, the then manager, explained to him that there was a cash payment, and that after the year was over he would receive two more payments. Snodgrass showed him a check he had just received for his 1943 production and told him he would get another later on. (R. 389.)

Clarence Quarnstrom testified that Stock said to the dairymen at a meeting where a cut in price was discussed, "What are you fellows crabbing about in the cut of price in milk? If the dairy makes any money there is nobody but you fellows can get a nickle of it; nobody else can touch it." (R. 400.)

THE FINDINGS OF FACT.

This court has upset the Findings of the District Court.

We believe the rule in all jurisdictions to be that, as stated in Vol. 5, C.J.S., page 686, subsection c:

> "Even when they are being reviewed on the grounds that they are insufficiently supported or are erroneous as a matter of law, the trial court's fact findings will never be lightly disturbed by the appellate court."
>
> Citing Federal and other cases.

> "Under the rules set forth in subsection c above, the appellate court in determining the sufficiency of the evidence to support the findings will indulge in every presumption in their favor, and give due weight to the trial court's superior advantages in passing on the facts, and judging the credibility of the witnesses."
>
> 5 C.J.S., 700 and cases cited.

> "According to statements or pronouncements of varying import the findings are to be regarded or considered as adequately supported and left undisturbed if the record discloses that they are sustained by material and competent evidence (5 C.J.S., 700 and numerous federal decisions under note 51), some or any competent or admissible evidence (5 C.J.S., 707 and federal and other decisions under note 52), evidence not inherently improbable or unworthy of belief upon its face, etc. 5 C.J.S., 709 and cases cited under Note 53."

The trial of this case commenced on March 13th and was concluded on July 15th. It occupied five or six

days given wholly to the hearing of testimony. It was submitted on written briefs. The trial court had the numerous exhibits, the Reports of Audit before him throughout the trial. He heard all the witnesses and was in a position to weed out the sham and frivolous defenses and to grasp the true situation. He reviewed the case in a concise and clear opinion (R. 590-595) after an exhaustive study of what he termed the detailed and illuminating briefs of counsel.

The trial court's Findings should not be lightly disturbed.

The appellate court does not agree with the findings of the trial court, and has upset the latter's findings because of this difference of opinion. More than a difference of opinion should be required. To justify a reversal on the facts, the evidence should at least clearly preponderate in favor of the appellate court's opinion, and there should be insufficient competent evidence to support the findings of the trial court. We urge that the evidence preponderates in favor of the trial court's findings.

THE BY-LAWS.

The By-Laws, and the contract drawn thereunder were designed to promote individual enterprise and not collectivism. It was not intended that the producer should bear the losses of the Cooperative, incurred in its transactions with other producers. They state:

> "Section 5. Distribution of Income. (a) The principal monetary gain to a member through his

> selling activities is his share of the proceeds received from the final sale of his product after *proper deductions* (italics ours) are made for expenses and Association obligations above referred to." (Referring to Section 3.)

The Cooperative in paragraph (7) of the contract designated what it considered the proper deductions. It was surely not contemplated that the Association losses in other departments should be absorbed by the producer who made a profit.

Article XV of the By-Laws provides a method for amending the By-Laws. It forbids certain amendments. It forbids any amendment which will,

> "deprive any member of rights and privileges then existing, or so to amend the by-laws as to effect a fundamental change in the policies of the Association."

We earnestly contend that to modify the contract so as to defeat its purposes is not within the power of the Association, and could not be done even by amendment of the By-Laws.

This court has decided that such an amendment of the contract was, in fact, made by the parties. The court has not considered the far reaching effect of its decision. It limits, in fact, as applied to this case, defeats, the producers' right to "direct monetary gain" which section 5 declares the contract provided for in section 3 of the By-Laws contemplates.

The decision of the court takes from the profits of the dairymen $20,319.20 which the association lost in

its dealings with the potato farmer. Whether it lost this money through overpayment, or by mismanagement, is immaterial. The Trading Post lost $10,315.52. It sold groceries which cost $100,165.22 at a mark-up of 9.23%, which was business suicide in any country. Both losses were made under the management of Snodgrass.

All this money, by the court's decision, has been taken directly out of the profits of the dairymen. They have been made to contribute to the support of the produce farmer. This is collectivism, and contrary to the purposes of the Cooperative according to its Articles.

CONCLUSION.

The writer apologizes to the court for the length of this petition. He has been compelled to present an argument on questions of fact, and has perhaps manifested less tolerance of the views he opposes than would be the case were only questions of law involved, as is usually the case in the appellate court.

The writer believes the decision of the appellate court does his clients grave injustice. He feels that court has a misconception of the moral aspects of this case. That the court has labored under the impression that the dairymen have made extremely large profits and that the contract they seek to enforce is unfair to the Association.

Such is not the case. Very few of the dairymen have prospered. Their expenses are unusually high.

An independent dairy in Anchorage pays a greater flat price for dairymen's milk than the plaintiff ever received altogether, including his supplemental payments. It buys its milk from dairy farmers in the Matanuska Valley, who either have never belonged to the Association, or have managed to shake loose from it, which few can, on account of their indebtedness. It hauls the milk just as far and pasteurizes it in Anchorage, and pays the producer the equivalent of 22c a quart, flat price, and makes money. We recognize that these facts are not in evidence, but they are relevant to the appellate court's opinion which is partially based upon a contrary conception of the situation.

We have called attention to the fact, as shown by the record, that the judgment in this case was collected and the proceeds disbursed more than three years before the appeal was argued. That leaves the plaintiff and his assignors in an extremely embarrassing predicament for the plaintiff has left the Territory. We do not urge that this situation should affect the fate of this petition, for it is not the duty of the court to extricate us from this predicament. But the writer feels that the situation calls for the most careful consideration of this petition.

We believe that the court's attention has been called to evidence in support of the trial court's findings which it did not consider in its opinion. We know that the court did not notice that the dairymen have been and are in fact paying for the dairy building in Anchorage, as well as the depreciation on the Creamery in Palmer. We have called attention to the evidence

of Marvin Allyn, who represented the Association at the trial and who testified positively that the Association as a whole absorbed the loss in the Produce Department. All these facts and other testimony in support of the trial court's findings have been called to this court's attention, which were not considered in arriving at the decision. Also defendant's answer supports the findings. Possibly additional facts can be gleaned from the record, and at least additional argument can be made on a rehearing, which may impel the appellate court to reverse its decision and affirm that of the district court.

Counsel for appellee earnestly requests an opportunity for reargument.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition for a rehearing be granted and that the judgment of the district court be upon further consideration affirmed.

Dated, Anchorage, Alaska,
May 31, 1951.

Respectfully submitted,
GEORGE B. GRIGSBY,
Attorney for Appellee
and Petitioner.

Certificate of Counsel

I, George B. Grigsby, counsel for the above named petitioner, do hereby certify that the foregoing petition for a rehearing of this cause is in my judgment well founded and that it is not interposed for delay.

Dated, Anchorage, Alaska,
May 31, 1951.

George B. Grigsby,
Counsel for Appellee
and Petitioner.

No. 12,544

IN THE

United States Court of Appeals

For the Ninth Circuit

MATANUSKA VALLEY FARMERS COOPERATING ASSOCIATION (a corporation),
Appellant,

vs.

C. R. MONAGHAN,
Appellee.

SUPPLEMENTAL BRIEF ON PETITION FOR A REHEARING.

GEORGE B. GRIGSBY,
Anchorage, Alaska,
Attorney for Appellee and Petitioner.

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ALLOCATION OF PROFITS.

An attempt was made by the witness, Snodgrass, ex-manager of the Cooperative, to explain the system of distribution of Association profits after the end of each fiscal year. He advanced the theory that after determining the net profits of the Association for a given year these profits were returned to those producers who are shown by the books to have earned them.

The brief of appellant adopted this theory of distribution and called it "Allocation of Profits".

The Appellate Court seems to have gone along with this theory of distribution, for it states on page 5 of its opinion:

operative has distributed in addition the net profits of the entire Cooperative. The figures do not support that statement, and we respectfully assert that the court is mistaken.

In 1943 the net profits of the entire Cooperative were, as shown above, the sum of $65,252.42. In addition to the flat, irrevocable payments, the Cooperative paid to producers of milk, cream, eggs, and meat additional payments to the amount of $47,516.19. (Defendant's Ex. I, pages 3-4.) The balance was retained by the Cooperative, presumably as the Creamery share of the profits of the Creamery-Dairy, and the Meat Department share of any profits made from the resale of meat purchased from the farmers, which would be a small amount.

In 1944 the net profits of the entire Cooperative were, as shown above, the sum of $61,580.27. In addition to the flat irrevocable payments the Cooperative paid to milk and egg producers additional payments to the amount of $47,528.40 (Plaintiff's Ex. 6, page 3) of which $45,919.20 was paid to milk producers and $1609.20 to egg producers. (Plaintiff's Ex. 6, page 16.)

The balance was retained by the Cooperative as the Creamery share of the Creamery-Dairy profits. It amounted according to Plaintiff's Ex. 6, page 3, to $18,943.42.

These balances retained by the Cooperative out of the 1943 and 1944 were not distributed to anyone. The $18,943.42, as the court will remember, was strenuously contended by the witnesses Snodgrass and

Allyn, to be the part of the profit earned by the Creamery in 1944.

Now when the dairymen were made these additional payments in 1944 and 1945, they accepted them as being the profits, made on the resale of their milk, in accordance with the contract. The payments were made in instalments. In 1945 they received one payment of $22,563.31, made shortly after the audit, and one of $23,355.89, made later in the year. Their individual remittance slips, which are in evidence, show that these payments were designated, "Second Payment on Milk Pool" and "Final Payment on Milk Pool". This shows conclusively that they were being paid according to paragraphs (6) and (7) of the marketing contract, because no other paragraphs contemplate a pool. The first payments were the "flat, irrevocable payments, paid bi-weekly, and which aggregated $136,143.47. That is to all the dairymen.

Now we have shown that the dairymen were at no time paid the net profits of the entire Cooperative as additional payments. They were paid what they had a right to assume was their profits on the resale of their milk, after the deductions, established by the Association as proper deductions, and specified in the marketing contract, had been made. They had nothing to gain, but much to lose, by consenting to a modification of the contract, which could at no time increase their profits, but could, and did, according to the Appellate Court's decision, greatly reduce them.

The five, which are called "consumer's departments", could not share in profits, nor could the

Creamery branch of the Creamery-Dairy department share in profits. If they made profits they were retained by the Cooperative as Cooperative profits. They could not be paid to the producer. All that could be paid to the producer was the profit made on the resale of his milk, under the contract, and it was at no time paid to the producer as an allocation of profits of the Association, to "those Producers who were deemed to have earned them".

When the Cooperative paid the dairymen additional payments for the milk sold the previous year, they said, in effect to the dairymen, "here are your profits on the resale of your milk." The remittance slips in evidence said that. They said that in 1945, when the Cooperative paid them $45,919.20, and retained $18,943.42 as Creamery earnings. They said that in 1944, when the Cooperative paid the producers of milk, cream, eggs and meat, the sum of $47,516.19 and retained about $18,000.00 as Creamery profits. The Cooperative paid, or pretended to pay to the dairmen, not on allocation of net profits of the Association, but what was owing to the dairymen for their milk under the contract.

The court says on page 6 of its opinion, "No attempt has been made to return to the individual producer the proceeds from the resale of his produce." We believe that the evidence shows that for every year's operations since the Association went into the business of buying and selling fluid milk, the Cooperative has assumed to pay the producer the profits made on the resale of his milk, under the terms of the original contract.

ADVANCES.

We concede that the down payments made to the dairymen on delivery of his milk were not advances in the strict sense of paragraph (4) of the contract. Under that paragraph the Association was not obligated to make any advances. They did make down payments, after delivery, and after they had marketed the milk and were perfectly safe in so doing. Down payments were not inconsistent with the terms of the contract. These payments, were not carried on the books as advances, but, as this court says on page 5 of the opinion, as "cost of goods sold". They were not deducted from the proceeds of the resale, as "repayment of advances made to producer under paragraph 4 of this contract and interest on said advances" as provided in paragraph 7(a), but were credited to the Association and charged to the producer, as "cost of goods sold".

No interest was chargeable, as the milk was sold before the producer was paid. In this connection we ask the court to read the testimony of Snodgrass, commencing with the last question on page 513 of the record, and ending on page 515.

For the additional reasons herein set forth the appellant renews his request for a rehearing of this cause.

Dated, Anchorage, Alaska,
May 31, 1951.

Respectfully submitted,
GEORGE B. GRIGSBY,
Attorney for Petitioner.